(1) eme Court, U.S.
F I L E D

99 917 NOV 29 1999

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

PINKLEY INCORPORATED t/a "Bradley Books",

Petitioner,

v.

ROBERT A. SERVACEK, DAVID S. GEARINGER, JOHN LAMMERS, Individually and in their official capacities as police officers of Frederick City Police Department City of Frederick, Maryland; RICHARD J. ASHTON, Individually and in his official capacity as a Major and Chief of Frederick City Police Department and policy maker of City of Frederick, Maryland; and the Mayor and Board of Alderman of City of Frederick, Maryland constituting and acting as City of Frederick, Maryland,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM E. SEEKFORD
Attorney for Petitioner
9924 Pepper Hill Road
Perry Hall, Maryland 21128
(410) 529-0422

10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals commit reversible error in failing to conduct the required de novo review upon the questions of law presented by this appeal of the District Court's findings of law that Petitioner was not deprived of its substantial constitutional rights against unconstitutional "prior restraints" of speech, and being unconstitutionally subjected to "unreasonable searches and seizures" of speech and press materials under 42, U.S.C. §1983, as set out in complaint counts one and two.

2. Did the Court of Appeals err in not conducting a de novo review of the mixed questions of the historical facts to the questions of law presented on appeal related to complaint counts one and two and if vacated to remand to the District Court for further findings and application of those corrected facts to the correct issues of law applicable to these substantial First, Fourth, and Fourteenth Amendment issues?

3. Did the Court of Appeals commit clear error and abuse its discretion in not conducting a review of any of the contested findings of fact by the District Court, presented on appeal, as to counts one and two as well as not applying the required "clear error" and "abuse of discretion" standards to those contested factual issues involving substantial First, Fourth, and Fourteenth Amendment civil rights in application of 42, U.S.C., §1983?

4. Did the Courts below commit "clear error" and "abuse of discretion", even by summary affirmance, that as to Counts One and Two, the Respondents did not subject Petitioner

to the wrongful deprivation of its substantial First, Fourth, and Fourteenth Amendment rights, under U.S.C., §1983, in approving use of only the police officer's conclusory determinations that probable cause existed to seize all unidentified speech works and dissemination equipment and obtain, execute and conduct a mass seizure by police ad hoc determinations without any particularity under a "general warrant" and without an adversary hearing?

5. Did the Courts below err in refusing, under the facts and circumstances presented, to apply and enforce this Court's established constitutional procedures rulings and law as set out in Lee Art Theaters, 392 U.S. 636; Roaden v. Kentucky, 413 U.S. 496; Heller v. New York, 413 U.S. 483; A Quantity of Books v. Kansas, 378 U.S. 205; Marcus v. Search Warrants, 367 U.S. 717; Ft. Wayne Books v. Indiana, 496 U.S. 46; Malley v. Briggs, 475 U.S. 335 as well as established Maryland law under Europo Books v. Pomerleau, 395 A.2d 1195 (prohibiting seizure of projection equipment as evidence of obscenity crimes or as contraband); and Randall Books v. State, 497 A.2d 1174 (warrant affiant must allege speech to be seized is obscene and submit factual probable cause therefore to independent magistrate with particularity?

6. Was the search warrant a prohibited "general" warrant for seizure and suppression of unidentified First Amendment materials thus lacking the particularity requirement of the Fourth and Fourteenth Amendments for warrants compelled by Stanford v. Texas, 379 U.S. 476, et. al.,?

7. Did the District Court and the Court of Appeals on appeal err by summary affirmance, that the individual

Respondents were entitled to "qualified immunity" as to counts one and two?

8. Did the District Court err in determining, and the Court of Appeals by its summary affirmance, that the Respondent Ashton, Chief of Police, was not "the highest decision maker of the City of Frederick", and there was no showing of the existence of city policy, removing both from liability for the actions complained of?

9. Did the Court of Appeals err in vacating the District Court findings of fact, conclusions of law, and its exercise of "supplemental jurisdiction", in count three under 28. U.S.C. §1367 and directing the District Court to enter an order of dismissal on count three for lack of jurisdiction?

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(b) AND RULE 29.6

All parties to the proceedings below in the United States Court of Appeals for the Fourth Circuit as well as the District Court appear in the caption of the case and are the only interested parties.

There are no parties which are public corporations having publicly traded stocks, nor parent, subsidiary or affiliate corporations to list pursuant to Rule 29.6.

Respondent City of Frederick is a municipal corporation is a body politic acting by the Mayor and Board of Alderman of the City of Frederick and capable of suing and being sued under those names.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . i

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULES 14.1(b) AND 29.6 . iv

TABLE OF CONTENTS v

TABLE OF CITATIONS vi

CITATIONS OF OPINIONS BELOW . . 1

STATEMENT OF THIS COURT'S JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . 2

STATEMENT OF THE CASE . . . 2

ARGUMENT 12

CONCLUSION 27

APPENDIX 1A

TABLE OF CITATIONS

Table of Cases: **Page**

Adler v. Pomerleau, (Three-Judge Court) 313 F. Supp. 277 . . . . . 13, 14

Albemarle Paper Co. v. Moody, 422 U.S. 405 . 26

Anderson v. Creighton, 483 U.S. 635 . . 19

A Quantity of Books v. Kansas, 378 U.S. 205 . ii, 13, 16

Arizona v. Evans, 115 S.Ct. 1185, ____ . . 21

Atty. Griev. Comm'r. v. Hanby, 589 A.2d 53 (MD. 1991) 25

Atty. Griev. Comm'r. v. Rohrback, 591 A.2d 488 (MD. 1991) 25

Brown v. Ashton, 611 A.2d 599, 613 . . 15

Butz v. Economou, 438 U.S. 498, 98 S.Ct. At 2906 17

Campbell v. Stanford, 817 F.2d 499 . . 26

Care v. Piphus, 435 U.S. 247 22

Carroll v. City of Orlando, 311 F.Supp. 967 . 14

Clea v. City of Baltimore, 541 A.2d 1303 . . 15, 16

Conley v. Gibson, 335 U.S. 41, 48 . . . 26, 27

Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017 . . . . . 17, 18

Deakins v. Monaghan, 484 U.S. 193 . . 21

Drombrowski v. Pfister, 380 U.S. 479 . . 13

Elrod v. Burns, 427 U.S. 346 . . . 21

Europo Books v. Pomerleau, 395 A.2d 1195 . ii, 15

Ft. Wayne Books v. Indiana, 489 U.S. 46 . ii, 14, 17, 21, 33

Gilbane Bldg. Co. v. Fed. Reserve Bk. Of Rich., 80 F.3d 895 . . . 26

Harlow v. Fitzgerald, 457 U.S. 800 . . 17, 18

Hitzelberger v. State, 173 MD. 435, 196 A. 288 . 16

In Re Special Investigation, NO. 228, 458 A.ed 280 (MD. 1983) 22

Jones v. Baltimore City Police Department, 606 A.2d 214 (MD. 1992) 24, 25

Kingsley Books v. Brown, 354 U.S. 436 . . 13

Lee Art Theaters v. Virginia, 392, U.S. 636 . ii, 16, 21

Lynch v. Household Finance Corp., 405 U.S. 538 . 21

Malley v. Briggs, 475 U.S. 335, 345 . . . ii, 19

Marcus v. Search Warrants, 367 U.S. 717 . ii, 13, 16, 21

Mitchell v. Forsyth, 472 U.S. 511 526 (1985) . 19

Monroe v. Pape, 365 U.S. 167, 187 19

Murphy v. Ohl, 159 MD. 7, 149 A. 566 . . 16

New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (CA 4, 1974) 27

Procunier v. Navarette, 434 U.S. 555, 562, 98 S.Ct. 17

Quillen v. International Playtex, Inc., 789 F.2d 1041, 1044 (4th Cir 1986) . . . 26

Randall Books v. State, 497 A.2d 1174 . . ii, 14

R.A.V. v. City of St. Paul, 505 U.S. 377 . . 20

Ritchie v. Donnelly, 597 A.2d 432 . . . 15, 16

Roaden v. Kentucky, 413 U.S. 496 . . . ii, 16, 21

Rodriguez v. Doral Mtg. Corp, 57 F.3d 1168, 1171 27

Sable Comm. v. F.C.C., 492, U.S. 115, 124 . 20

Soldol v. Cook County, 113 S.Ct. 538 . . 21

Stanley v. Georgia, 394 U.S. 557 . . . 13

Thompson v. Allstate Insurance Co., (D. Ala., 1973), 476 F.2d 746 27

Tyrone v. Wilkinson, 410 F.2d 639 . . . 14

U.S. v. Calandra, 414 U.S. 338, 354 . . 21

U.S. v. James D. Good Real Property, 114 S.Ct. 492 21

Walter v. U.S., 447 U.S. 649 . . . 16

Wolf v. Colorado, 338 U.S. 25 . . . 21

Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1001 18

Zwickler v. Koota, 389 U.S. 241 . . . 13

Statutes Cited:

U.S. Statutes:

28, U.S.C., §1254	2
28, U.S.C., §1291	2
28, U.S.C., §1343(a)(3)	2
28, U.S.C., §1343(a)(4)	2
28, U.S.C., §1367	iii, 2
28, U.S.C., §1367(a)	4, 26
42, U.S.C., §1983	passim
42, U.S.C., §1988	2, 10, 12

Maryland:

Art. 27, Section 15(a)	8, 9
Section 55	22
Section 416A through 416D.	2, 5, 7, 13, 14
Section 417	5
Section 418	2, 7, 9, 13
Section 418A	2, 5, 8, 10, 13
Section 421	.2, 5, 7, 13
Section 641	9, 24
Section 551	9, 22

Constitutional Provisions:

Amendment One	passim
Amendment Four	passim
Amendment Fourteen	i, ii, 2, 3, 12, 13, 14

APPENDIX

Appendix "A" Reported opinion of the United States Court of Appeals for the Fourth Circuit filed August 31, 1999 . . . . . 1A

Appendix "B" Mandate of Fourth Circuit filed September 22, 1999 . . . . 22A

Appendix "C" Unpublished Opinion of the United States District Court of Maryland with findings of fact and conclusions of law filed January 21, 1996 . . . . . 23A

Appendix "D" Order of Judgment entered January 21, 1996 . . . . . 47A

Appendix "E" Order denying Motion to Alter Judgment entered March 6, 1996 . . . . . 49A

Appendix "F" Constitutional and statory provisions involved 54A

Petitioner Pinkley, Inc., respectfully prays that this Court issue its Write of Certiorari to review the published opinion and judgment of the United States Court of Appeals For The Fourth Circuit and the underlying judgment of the United States District Court for Maryland rejecting adherence to essential decisions of this Court and Maryland decisions involving firmly established First and Fourth Amendment law.

CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 191 F.3d 394 and is set out in Appendix "A" herein.

The unreported opinion and judgment of the United States District Court for the District of Maryland is set out in Appendix "C" herein.

The order of the District Court denying Petitioner's Motion to Amend as well as the Motion to Alter and Amend or Grant Appropriate Relief are set out as Appendix "E" and "F" herein.

STATEMENT OF THIS COURT'S JURISDICTION

The reported decision of the United States Court of Appeals for the Fourth Circuit summarily affirming the District Court as to the counts one and two as well as vacating the District Court's judgment as to count three and ordering remand for entry of order of dismissal, of that count, was entered August 31, 1999. That Court's mandate was issued September 22, 1999.

The unreported decision and judgment of the District Court was filed January 21, 1996. That Court's orders denying subsequent motions (1) to alter judgment and (2) to alter and amend or grant appropriate relief were filed March 6, 1996 and March 11, 1996 respectively. The decisions below are final.

Jurisdiction of this Court is invoked under 28, U.S.C., §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First, Fourth, and Fourteenth Amendments and statutory provisions of 28, U.S.C., §1367 and 42, U.S.C., §1983; Maryland Code Art. 27, Sections 416A, 416D, 418, 418A and 421; are reproduced in the Appendix.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The jurisdiction of the Court of Appeals for the Fourth Circuit was invoked in the first instance below pursuant to 28, U.S.C. §1291.

The jurisdiction of the District Court of Maryland was invoked under 28, U.S.C., §1331 and 1343(a)(3) and (a)(4) as well as under the substantive provisions of 42, U.S.C., §1983 and 1988.

B. BACKGROUND

On February 5, 1993, Plaintiff Pinkley, Inc., T/A "Bradley Books", filed a three count Complaint against the City of Frederick, the Mayor and Board of Alderman as its governing body, its Chief of Police, and several members of its police department concerning Defendants' preparing and applying for, as well as the execution of, a Search and Seizure Warrant and the consequential closure of its bookstore on February 7, 1990 at the Plaintiff's bookstore premises, during which virtually all of the film, videos, publications, essential exhibition equipment, newspapers, and movies being disseminated by sale, and ongoing exhibition, were massively seized. It also was based on the failure of those Defendants to return unadjudicated speech material upon written demand or to provide the bookstore the constitutionally required adversary hearing as set out in the written demand, upon the validity of continued detention of the presumptively protected speech and press goods and equipment. Unknown to Pinkley, during the period between seizure and filing of suit, the Defendants, without Court authorization by Maryland law, sold, buried in landfills, or converted to their own use and possession all the seized property of Pinkley. Count I alleged a wrongful, unconstitutional prior restraint and abridgement of Plaintiff's established First and Fourteenth Amendment civil rights and freedom of speech rights and prohibitions against such seizures under established Maryland law. The speech claim also included loss of property and income in the harm suffered by prohibited dissemination rights of the seized speech and income. Count II of the Complaint alleged a wrongful, unreasonable and unconstitutional search and seizure under facially invalid warrant, wrongfully applied for, and which issued as a prohibited "general" warrant, and the abridgement thereby of Pinkley's Fourth and Fourteenth Amendment rights with respect to the seized First Amendment materials in

contravention of established Federal constitutional and State law. Count III of the Complaint alleged a denial of Due Process in the tortious conversion of Pinkley's property. This count was later held by the Trial Court to be a State law claim involving "Supplementary Jurisdiction", 28 U.S.C., §1367(a).

On November 29, and 30, 1993, a Court trial was conducted by Senior District Judge Edward S. Northrop. No decision however was rendered over the ensuing 26 months. On January 19, 1996, the District Court issued a Memorandum Opinion and separate Order entering judgment in favor of the Defendants and against the Plaintiff as to Counts I and II, and judgment in favor of Plaintiff as to Count III. However, the judgment as to Count III was solely against Defendant City of Frederick and only for the publications in the amount of $20,775.41.

Plaintiff, on February 5, 1996, filed a Motion to Alter or Amend the Judgment in which it alleged error in the Court's "Findings of Fact" and "Conclusions of Law". On March 4, 1996, the District Court issued its Memorandum and Order denying Petitioner's Motion to Alter or Amend. Pinkley then filed a Motion under F.R.C.P. 7(b), 60(a), and 59(e) to correct the Court's Denial to Alter or Amend judgment erroneously entered based upon untimeliness. The Court again denied the Plaintiff's motion, even if timely. The decision and judgment thus being final the City of Frederick filed its Appeal followed by Pinkley's Cross-Appeal as to the judgment against it in Counts I and II as well as damages by losses not included in the judgment.

The Court of Appeals affirmed judgment against

Petitioner as to Counts One and Two by summary affirmance and vacated Count Three and ordered its dismissal on August 31, 1999 some 26 months after argument. Petitioner has obtained NO. 42, U.S.C., §1983 relief for the seizure and destruction, without hearing or judicial findings, of all its speech and press works.

STATEMENT OF FACTS

B. The City of Frederick is an independent chartered city. As such its powers are provided by controlling State law, and statewide general statutes, including the sexual display laws of Art. 27, Sect. 416A through416D as well as the obscenity laws of Art. 27, Sect. 417 through 421 including the State civil declaratory judgment action for seizure and destruction of allegedly obscene materials. Otherwise it is governed by its charter. The Mayor is Chief Executive Officer and Respondent Ashton is head of the City police department its agents, servants, and employees.

The State's Attorney of Frederick County is the prosecutor of the County but has no control or supervision of the City police officers but does have the duty to carry out all actions required to be conducted under Art. 27, Sect. 418A as to seizure, hearing and destruction of condemned speech and press materials. He instituted no such mandatory proceeding to have Petitioner's speech materials declared obscene, conduct the required adversary hearing with notice to and right to defend afforded Petitioner, nor did he obtain a judicial declaration of obscenity as any of the seized goods. And finally he did not obtain the required Circuit Court order for anyone to take custody of the condemned goods and to destroy them as provided

and required in that controlling statute.

On September 19, 1989, a complaint from a resident of Middletown, Maryland, and a member of the religiously affiliated "Concerned Women of Frederick" dedicated to stopping dissemination of sexually oriented speech materials, orally filed a complaint with the Frederick police department that Bradley Books was believed to be selling obscene materials. Detective Servacek was assigned and reviewed the State obscenity laws and conferred with the County prosecutor.

During the investigation, he had an undercover officer survey the premises on several occasions during which time that officer purchased a total one (1) paperback novel, one (1) videotape film, and twelve (12) magazines.

On February 1, 1990, Servacek typed his own search warrant application and affidavit as well as his desired search warrant. He recited the undercover purchases in but merely attached black and white photocopies of either the covers or the interior pages, of several of the purchased magazines, to the application.

The application and affidavit alleged an undercover officer had observed magazines on the premises depicting nudity on the covers as well as subjects involved in fellatio, cunnilingus, intercourse, and bondage, and some video films. He also wrote that the undercover officer described the magazines for sale at Bradley Books had sexual conduct as to most if not all of them, and depict all forms of sexual conduct and that the store had numerous "x-rated video movies." Not one speech work was particularly described or identified and even the last store

visit occurred some 20 days previously.

Servacek's application did not particularize the items to be seized and the warrant similarly did not particularize, or specify the identity of, what objects to seize, leaving that determination to Servacek and the other executing officers Gearinger and Lammers. The application requested and the warrant gave the authority to seize any and all copies of items the officers determined during execution were obscene or seizable. The judge did not make any independent judicial probable cause finding of probable obscenity of the items to be seized, but simply stated his reliance upon the probable cause finding of Servacek to support its issuance.

They executed the warrant at Bradley on February 7, 1990 and warrantlessly arrested Clerk Paul Sobus for violation of Art. 27, Sect. 416D, 418, and 421. They also perused the outside covers of all the merchandise and as a result they seized all 8 operating video television screens and all 8 video films being exhibited in them; from the storeroom and supplies room they seized all 15 motion picture film projectors; from behind the counter and from the storeroom and supplies room they seized all 17 operating Panasonic V.C.R.s; they seized all 359 displayed and stocked motion picture film; they seized all 75 V.H.S. videotape film displayed and stocked as well as all 451 magazines, 157 paperback novels and all 13 copies of newspapers along with 75 placards and displays on the premises. From behind the counter and in the viewing booths they seized $1,279.16 cash, and upon removing Sobus, and the seized items, they printed up and posted a "Closed" sign on the entrance. The seized goods were taken directly to and placed in the police department headquarters evidence and property room. Virtually

all of the speech works as well as all exhibition equipment was taken.

As a consequence, Bradley Books was forcibly closed for a substantial period until the Petitioner could obtain some replacement goods and equipment.

On February 9, 1990 separate letters containing a written demand by Bradley Books for return, of its seized goods which precluded dissemination as no copies remained, or for them to conduct a judicial adversary hearing on the obscenity of each seized item, as provided in Art. 27, Sect. 418A, were delivered to the Mayor, Chief Ashton, and to Servacek. A copy was provided to the State's Attorney. No such hearing was held nor any of the speech items returned.

Clerk Sobus obtained his own private attorney, and Bradley's attorney assisted as co-counsel, in defense of the obscenity charges. Notwithstanding the fact that no evidence of sexual activity was seized during the search and arrest of Sobus on obscenity charges alone, but only after the written demand for the judicial hearing for their return, Servacek on February 21, 1990 filed an additional charge against Sobus for maintaining a bawdyhouse (video booths and permitting sexual conduct in them) under Art. 27, Sect. 15(a). Sobus was then discharged from Bradley Books employment.

Sobus filed motions to quash the warrant and order the return of the seized items while awaiting trial. However, upon commencement of plea negotiations by the State's Attorney with Sobus's personal attorney, Bradley's attorney struck his appearance as a conflict existed. Thereafter based upon personal

agreements between Sobus, his private attorney and the State's Attorney they reached an agreement as to all charges.

By their plea agreement, on June 18, 1990, Sobus pled guilty to violating Art. 27, Sect. 418 and 15(a), provided he would have his charges adjudicated under the disposition provisions of Art. 27, Sect. 641. The Court accepted Sobus's plea agreement without speech items or an obscenity determination and entered its order under Art. 27, Sect. 641 as to both charges. The State's Attorney informed the Court that the criminal case was continuing. The Statute of Limitations is a term of 3 years. No materials were adjudicated.

Art. 27, Sect. 641 is a non-conviction, non judgment diversion statute using probation for a term and dismissal of the criminal charges upon expiration of the probation. It is not a guilty finding, carries no punishment, is not a conviction for purposes of later prosecutions and may not be used to enhance punishment for a second offense.

No seized item was removed from the evidence room at any time and none was presented to any judicial officer since the seizure, and no speech item was presented at Sobus's plea agreement hearing resulting in the Court merely accepting the agreement without a judicial determination as to the obscenity of any of them.

Petitioner, from the time Sobus was arrested, under Maryland law as uncharged owner of the seized goods it could not intervene in the Sobus criminal proceeding and it could not seek Art. 27, Sect. 551 replevin in the interim. During that period the State's Attorney alone could file such a proceeding

under Art. 27, Sect. 418A for that determination.

The Respondents were barred, by clearly established prior Maryland law, from seeking and obtaining this search warrant as well as executing it and thereby seizing any of the projectors, V.C.R.'s, and projection equipment as either tools of an obscenity crime or as evidence.

The Frederick City Ordinances prescribe that seized items, after their prosecution needs are met and prior to disposition (except as to allegedly obscene items), must be kept in custody and prior to disposal the owner must be notified in writing and afforded the right to reclaim them. It also requires all monies, seized and monies obtained from auctioned items, to be turned over to and accounted for by the City financial officer. These Respondents instead did not seek an Art. 27, Sect. 418A proceeding or give notice to Petitioner to reclaim its property, and without Court order, they auctioned some items and kept the monies along with the seized monies without accounting or turning over the monies to the City financial officer as well as giving the projection equipment to Servacek and destroying the remaining property in the City landfill in violation of clearly established law without notice to Pinkley or hearing or Court order.

After expiration of its legal disability, from filing into the criminal Court, Pinkley filed the present three-count civil rights complaint under 42, U.S.C., §1983, 1988 for damages, counsel fees, property and income lost and equitable relief.

The District Court opinion and judgment found that the evidence and testimony on these facts failed to show the

presence of a constitutional violation required under 42, U.S.C., §1983 as to counts one and two but entered judgment for Pinkley under count three for a State law conversion claim for some of the value of the converted property. Yet the Court made findings of fact NO. 22 that Servacek alone determined which materials to seize by assessing their obscenity vel non during is examination of their covers as he himself defined in his prepared warrant signed by the judge. Conclusion of Law NOS. 2 and 3 were entered concluding as a matter of law that the issuing judge had probable cause when he made no such finding and the warrant was not overbroad since the Defendant Servacek himself could evaluate its probable obscenity and he could also determine probable cause for seizure of each item. The warrant need not particularly describe any speech work for it to be seized under the wording of the warrant. Likewise, Conclusion of Law NOS. 3, 4, 5, 8, 9, and 10 finding no individual liability of the officers, the Chief of Police or even the City as to the policy actions of the Police Chief here was not by "the highest decision maker" as to counts one and two were made in the fact of the evidence.

On appeal, the United States Court of Appeals for the Fourth Circuit was requested to review Findings of Fact NOS. 9, 11, 12, 16, 20, and 27 and footnotes as clearly erroneous and Conclusions of Law NOS. 2 through 6, 8, 9, 10, and 13 with footnotes as erroneous as well as the legal determinations upon the evidence that judgment was correctly entered in favor of all Defendants and against Petitioners as to counts one and two.

The Court of Appeals did not conduct a de novo, or any review, of the questions of law presented and the District Court conclusions of law complained of an appeal, or even of the

complained of findings of fact based upon the clearly erroneous standard, but simply rendered a one sentence summary affirmance as to counts one and two for the reasons given by the District Court.

As to count three the Court of Appeals vacated the judgment in favor of Pinkley by reliance upon F.R.C.P. 54(c) and rejecting the Trial Court's reliance upon F.R.C.P. 15(b) but finding it was an abuse of discretion and ordered that count dismissed, on jurisdictional grounds, completing the total denial of federal relief under 42, U.S.C. §1983, 1988 for the mass seizure and destruction or conversion of the entire contents, equipment, and speech works and consequential deprivation of its First, Fourth, and Fourteenth Amendment rights by the District Court and the Fourth Circuit's decisons that the firmly established law of this Court and Maryland's Appellate Courts, as relied on by Petitioner, do not apply to the mass seizure and general warrant police officer discretion in this seizure of speech and press and may no longer be relied upon under the circumstances complained of.

I. COUNTS ONE AND TWO WERE VALID SINCE THE SEARCH FOR AND SEIZURE OF UNIDENTIFIED SPEECH AND PRESS WORKS AND PROJECTION EQUIPMENT IS PROHIBITED BY ESTABLISHED FEDERAL AND MARYLAND DECISIONAL LAW UNDER THE FIRST AND FOURTH AMENDMENTS AND ACTIONABLE UNDER 42, U.S.C. §1983

After meeting an informant on October 29, 1989, Servacek admitted that "your affiant researched the Annotated

Code of Maryland. Article 27, "Crimes and Punishment" and specifically "found and used as the basis for the investigation" sections 416A, 416D, 418, and 421 involving obscene displays, distributions, and promoting matter held out as being obscene. He later testified that he reviewed the annotations and found a legal definition to use for "obscene." In doing so he had before him the Code annotations setting out that police could not constitutionally engage in the mass seizure as he contemplated without conducting a prior adversary hearing and the probable cause decision requiring a neutral and independent judicial finding of probable obscenity of particularly described works and excluding police seizure discretion. Those annotations also set out that mass seizures were not permissible. Finally, projection equipment may not be seized as contraband or tools of a crime of obscenity by Maryland law.

That at that time Article 27, Sections 416A, 416D, 418, and 418A annotations several times specifically referred the reader to the published opinion of Adler v. Pomerleau (Three-Judge ourt) 313 F. Supp. 277 to that effect, among others.

The Adler v. Pomerleau decision specifically referred the reader further to the relevant prior decisions of this Supreme Court regulating the constitutionality of mass seizures of speech, press and express materials and adversary hearing requirements..

That Court specifically identified the foundation First, Fourth, and Fourteenth Amendment decisions, inter alia, of; Marcus v. Search Warrants, 367 U.S. 717, A Quantity of Books v. Kansas, 378 U.S. 205, Zwickler v. Koota, 389 U.S. 241, Drombrowski v. Pfister, 380 U.S. 479, Stanley v. Georgia, 394 U.S. 557, Kingsley Books v. Brown, 354 U.S. 436, as well as

Tyrone v. Wilkinson, 410 F.2d 639 and the decisions listed in Carroll v. City of Orlando, 311 F. Supp. 967 all referred to by the Adler decision. These decisions set out much of the established First, Fourth and Fourteenth Amendment speech and press civil rights of citizens and limitations upon government officials. The statute annotations also cited Randall Books v. State, 64 MD. APP. 589, 497, A.2d 1174 which set out that an application for a search warrant to seize speech materials as violating Art. 27, Sect. 416D must allege and provide factual probable cause of obscenity upon particularly identified speech works for a neutral and detached judge to make his own independent judicial determinations. No warrant may issue which permits the executing officer to make on scene determinations as to what was and was not to be seized under it by that decision.

This Supreme Court on February 21, 1989, some one year prior to the issuance and execution of Servocek's search warrant, also decided Ft. Wayne Books, Inc. v. Indiana, 489 U.S. 46, in which this Court stated certiorari review was granted "for the purpose of considering the substantial constitutional issues raised by the pretrial seizure," 489 U.S. at 53. This decision reaffirmed most of the decisions cited in Adler. The probable cause basis used by the prosecutor, police officers and the State search warrant in Ft. Wayne was struck down alleging that thirty nine (39) prior criminal convictions were obtained for selling obscene materials by Ft. Wayne Books and the affidavit allegation there currently were other obscene materials in the stores, 489 U.S. at 51-52, 62-66. Further that the affidavit here reveals Defendant Servacek, a year after Ft. Wayne violated the holding.

Over 10 years prior to Servacek applying for, obtaining, and executing this search warrant for seizure of motion picture

film projectors, V.C.R.'s and television screens for exhibition of video tape film and movies Maryland Courts specifically held such seizures to be prohibited in Europo Books, Inc. v. Pomerleau, 41 MD. APP. 114, 395, A.2d 1195 even if alleged to be contraband "evidence of the crime". Further Maryland Courts have specifically held that a public official (police officer) who violates a Plaintiff's rights under the Constitution is entitled to no immunity, Brown v. Ashton, 611 A.2d 599, 613 (our Defendant Ashton here), citing Clea v. City of Baltimore, 541 A.2d 1303, Ritchie v. Donnelly, 597 A.2d 432.

Servacek and Ashton as well as the other Defendants conducting any review of the cited State criminal sections and the established legal rulings referred to would know and should know their conduct was constitutionally prohibited. This application for and issuance of the search warrant was prohibited by established law as well as the failure to particularize the items to be seized or permit the officers determinations thereon.

Pinkley presented these decisions and constitutional rulings to both Courts below and the relevant facts during suit, trial, and appeal. Both Courts refused to apply them and judgment against Petitioner was clearly erroneous as to Counts One and Two.

II. THE DEFENDANTS HERE ARE CHARGED IN THEIR DUTES UNDER MARYLAND LAW WITH KNOWLEDGE OF THE LAW AND OF MATTERS WHICH THEY SHOULD HAVE KNOWN AND ARE NOT ENTITLED TO QUALIFIED IMMUNITY

In Maryland, the law is that every person is presumed to know the law, and the facts which he has an opportunity to know.

In addition, public officials are presumed to know the law and including the extent of their authority, Murphy v. Ohl, 159 MD. 7, 149 A. 566. This includes a police officcer, Hitzelberger v. State, 173 MD. 435, 196 A. 288. Further and finally "as a general rule a party is presumed to know or is chargeable with knowledge of, matters which he had the opportunity of knowing and should know," C.J.S., Evidence, §150, M.L.E., Evidence, §24.

In fact, Maryland places an affirmative duty upon public officials to not only know the laws they are acting under, and violations of a person's rights under the Constitution, and that public official is entitled to no immunity, Clea v. City of Baltimore, 541 A.2d 1303, Ritchie v. Donnelly, 597 A.2d 432.

In addition, any reasonably intelligent and trained police officer would know the materials he sought to condemn were held as protected works under the First Amendment and that his personal belief of obscenity, even in the affidavit, could not support issuance of a search warrant, as established by this Court in Lee Art Theaters v. Virginia, 392 U.S. 636.

He would also know that a film then being exhibited to the public cannot be seized or treated and destroyed without notice, adversary hearing or judicial determination, as contraband, Roaden v. Kentucky, 413 U.S. 496, Walter v. U.S., 447 U.S. 649 A Quantity of Books v. Kansas, 378 U.S. 205, Marcus v. Search Warrants, 367 U.S. 717. Nor equated as

similar to other materials adjudicated or claimed to be obscene, Ft. Wayne Books v. Indiana, 489 U.S. 46. All of this law and the evidence in support were presented below but the Courts elected to ignore these holdings and established law just as Respondents did.

Because of this the Trial Court also erred in its findings of fact and conclusions of law related thereto and its judgment as to counts one and two and the Court of Appeals affirmation was erroneous under established law.

III. THESE OFFICERS ARE REQUIRED TO CONDUCT THEIR DISCRETIONARY ACTS IN GOOD FAITH TO BE ENTITLED TO QUALIFIED IMMUNITY

It was pointed out in Harlow v. Fitzgerald, 457 U.S. 800 the Court had altered the standard applicable to good faith qualified immunity from trials so as to differ from common law immunities. The inquiry into the objective reasonableness of the Defendants' conduct, it noted is only as measured by reference to whether it was a violation of clearly established law. Harlow, 457 U.S. at 818, 102 S.Ct. At 2739, Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017. And when considering this "No other 'circumstances' are relevant to the issue . . .". Davis, supra 468 U.S. at 191, 104 S.Ct. At 3017. This test uses, as its first half, the test as whether "the constitutional right he was alleged to have violated was clearly established at the time of the violation" Davis, 469 U.S. at 194, 104 S.Ct. At 3019 citing Butz v. Economou, 438 U.S. at 498, 98 S.Ct. At 2906 and Procunier v. Navarette, 434 U.S. 555, 562, 98 S.Ct. 855, 859.

Thereafter it only requires determination as whether the conduct at issue violated these clearly established constitutional rights "of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S.Ct. At 2737, Davis 468 U.S. at 197. Direct proof of this is not required.

In Harlow, the Court rejected the subjective mental element or intention aspect in favor of the objective aspect. The Harlow Court specifically adopted the "presumption of knowledge of and respect for "basic unquestioned constitutional rights' Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1001," . . Harlow, 457 U.S. at 315. Thereafter the Court said in justification that "where an official could be expected to know that certain conduct would violate . . . constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."

In addition to that presumption of knowledge, reaffirmed in Harlow, the Wood Court also held "but an act violating [a persons] constitutional right can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted [with supervision of those laws] than by the presence of actual malice", 420 U.S. at 321, and they must be held to a standard . . . on knowledge of the basic unquestioned constitutional rights of his charges. This it was held was not an impossible burden to impose. Thus these officers are not immune from damages.

This requirement that the constitutional rights violated be clearly established only requires that "the contours of [the] right must be sufficiently clear that [a] reasonable official would understand that what he is doing violates that right" and it is not

required that "the very action in question has previously been held unlawful" Anderson v. Creighton, 483 U.S. 365, but "in the light of pre-existing law the unlawfulness must be apparent" Anderson, Malley v. Briggs, 475 U.S. at 344-45, Mitchell, 472 U.S. at 528.

The mere ignorance of the search warrant constitutional defect, apparent on its face, has been found not to provide immunity. In respect to this issue the Supreme Court in Malley v. Briggs, specifically held that such a rationale is inconsistent with our interpretation of §1983, . . . and §1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 106 S.Ct. AT 1098, note 7, citing Monroe v. Pape, 365 U.S. 167, 187.

Again Petitioner, having produced the supporting evidence at trial, also presented the Courts below its constitutional and 42, U.S.C., §1983 claims in Counts One and Two but those Courts erroneously ruled to the contrary against this established law.

IV. THE UNCONSTITUTIONAL PRIOR RESTRAINT OF PINKLEY'S ESTABLISHED FIRST AMENDMENT RIGHTS OF DISSEMINATION AND SPEECH AND PRESS ACTIVITIES AS WELL AS THE UNCONSTITUTIONAL UNREASONABLE SEARCH AND SEIZURE INFLICTED UPON PINKLEY CONTRARY TO ESTABLISHED LAW CONSTITUTES A CONSTITUTIONAL VIOLATION

REQUIRED UNDER 42, U.S.C. §1983

The District Court below held that after considering the evidence presented and post-trial submissions that Pinkley has failed to show the presence of a constitutional violation. This is substantial error for as the aforegoing facts, evidence, and law presented by Pinkley, Inc. reveals there is no dispute by Respondents that the testimony was incorrect or the facts, relied on and alleged by Petitioner, were not proven, even down to the values of property and lost income. Respondents' conduct included complete prior restraint of all of Pinkley's constitutionally protected and unadjudicated speech materials by the seizure upon the determination of the seizing officers upon a facially invalid general warrant which, under established law, should not have been applied for, issued, or executed and used to seize all the works of expression and dissemination equipment. All of which the evidence revealed had occurred including the destruction of all the expressive items without notice, adversary hearing, judicial adjudication or judicially required Court order. From these facts, it was clearly established that a prohibited First Amendment prior restraint violation occurred and that a prohibited Fourth Amendment violation seizure also occurred. It was also proven that a prohibited mass seizure of speech works is a violation of established constitutional law but was committed here causing a deprivation of federally protected civil rights as alleged.

First Amendment expression materials are presumptively protected by the constitution against prior restraint by government. R.A.V. v. City of St. Paul, 112 S.Ct. 2538, Sable Comm. v. F.C.C., 492 U.S. 115, 124. This Court has specifically held that the prohibited prior restraint of such speech and press

rights produces irreparable injury. Elrod v. Burns, 427 U.S. 346. A single act of such prior restraint by seizure is separately actionable under 42, U.S.C., §1983. Deakins v. Monahgan, 484 U.S. 193. Thus the Court below erred in holding that Respondents' conduct did not bring forth the presence of a constitutional violation. The Court of Appeals summary affirmance was also error. This issue is separate from any good faith analysis.

Fourth Amendment search and seizure civil rights protection similarly protects against unconstitutional actions Wolf v. Colorado, 338 U.S. 25. The Fourth Amendment rights of reasonableness in search and seizure is modified to take into account the prohibition against prior restraints on expression by search and seizure so that a police officer is not allowed to make that probable cause determination as occurred here. Marcus v. Search Warrants, supra, Roaden, supra, Ft. Wayne Books, supra, and Lee Art Theaters v. Virginia, supra.

The "wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search and seizure itself." Arizona v. Evans, 115 S.Ct. 1185, U.S. v. Calandra, 414 U.S. 338, 354. Such conduct creates a cause of action Lynch v. Household Finance Corp., 405 U.S. 538, and even a single such seizure even where property is in the open or in the civil context and is actionable. Soldol v. Cook County, 113 S.Ct. 538, U.S. v. James D. Good Real Property, 114 S.Ct. 492.

Thus the Trial Court determination that the conduct complained of was not a constitutional violation is clearly erroneous as is the Court of Appeals summary affirmance.

V. THE COURT ERRED AS TO MARYLAND LAW IN DETERMINING THAT PINKLEY HAD A REMEDY UNDER ARTICLE 27, SECTION 551 AND WAS REQUIRED TO PURSUE IT

The Trial Court has misunderstood Maryland law as to the rights of owners to obtain return of seized properties under the criminal laws when it found that Article 27, §551 gave it a post deprivation remedy.

The law of Maryland is circumscribed as to the rights of personal property owners of property seized by police as evidence in criminal cases. No such right existed her for Pinkley to assert State claims on to bar its due process claims. See Care v. Piphus, 435 U.S. 247.

In the decision of In Re Special Investigation NO. 228, 458 A.2d 820 (MD. 1983) the Maryland Appellate Court set out fully the right an owner of seized property seeking its return had at all stages under Art. 27, Sect. 55) and the criminal rules.

First, when seizure occurred and after the arrest of the Clerk on the obscenity charges was made, two grounds for its return was available, (1) claims for property not as described in the warrant, and (2) claims of no probable cause. However, the only one who can file for return of the property is the Defendant. Pinkely was never a Defendant and could not file a criminal motion to return property.

However, prior to filing of criminal charges a Criminal Court during the period is without jurisdiction. But after criminal charges are placed the Defendant must file a motion in

Criminal Court because the Civil Counts have no jurisdiction. In addition while the matter was held under Criminal Court jurisdiction Pinkley could not file for recovery.

Therefore, the District Court was clearly erroneous and erred upon the law in determining Maryland law to the contrary.

VI. THE USE OF FORMER EMPLOYEE PAUL SORBUS OFFERING HIS GUILTY PLEA DURING A PLEA BARGAINED COURT SESSION AND THE UNSWORN EXTRA-JUDICIAL HEARSAY STATEMENTS OF AN ALLEGED EX-EMPLOYEE AS FINDINGS OF FACT TO SUPPORT CONCLUSIONS OF LAW WAS AN ABUSE OF DISCRETION AND VIOLATED EVIDENCE RULE 802

The Trial Court wrongfully made findings of fact NOS. 28 and footnotes 28, 29, and 30 were wrongfully adopted based upon extra-judicial evidentiary testimony by former Clerk Paul Sobus against its former employer, Pinkley, the Appellant, when on this record it was inadmissible hearsay and under Evidence Rule 802 and not admissible as made in a representative capacity against Pinkley. When made it was not made by Sobus in a representative capacity during employment under Evidence Rule 801(d)(2)(D) or under Evidence Rule 803(22).

Similarly, the Trial Court wrongfully made findings of fact NOS. 9, 11, 12, 13, 16, and footnotes 14, 15, 16, 17, 18, 19, and 24 based upon the alleged extra-judicial statements of an alleged former employee informant and alleged extra-judicial non-agent undercover officer located in a probable cause

statement entered as the basis of probable cause and not for the truth of the matters therein is violation of the hearsay rules above.

Ironically, the undercover office did testify at trial about other matters and could have testified about those alleged observations in Pinkley's store but did not. Therefore, his second-hand unsworn unspecific alleged generalizations to Servacek was inadmissible as substantive evidence and it was clearly erroneous and an abuse of discretion to make such finding of fact upon which to base its conclusions of law and judgment especially since Sobus testified at trial which was to the contrary.

With respect to Sobus' guilty plea under his non-employee acceptance of the terms of a plea bargain, it was clearly erroneous and an abuse of discretion for consideration of it in the affidavit as substantive evidence for several reasons. It is clear that factually no judgment that finding him guilty was entered against Sobus. He was simply put under probation and the charges later dismissed under Article 27, Sect. 641. Thus it is inadmissible as substantive evidence against Pinkley under Evidence Rule 803(22) and since it was made as part of a personal bargain when Sobus was no longer an employee to, bind Pinkley, and when Sobus obtained the benefits from the police and prosecutors bargain in return for his plea it procludes admission under Evidence Rule 801(d)(2)(D). In fact there was no speech work of Pinkley's ever judicially determined to be obscene.

Further it should be noted that Probation Before Judgment under Article 27, Sect. 641 is not a conviction for any purpose in any subsequent judicial proceedings. Jones v.

Baltimore City Police Department, 606 A.2d 214 (MD. 1992), Atty. Griev. Comm'r. V. Hanby, 589 A.2d 53 (MD. 1991), Atty. Griev. Comm'r. V. Rohrback, 591 A.2d 488 (MD. 1991).

Sobus actually testified under oath at the District Court trial below that Pinkley had instructed employees to eject anyone committing sexual acts and he had not seen nor permitted them to occur at the bookstore and that the alleged openings between booths were covered with metal plates which fact was proven when the seizure was accomplished as clearly revealed being in place in evidentiary photographs.

Thus except for evaluating the hearsay statements of the undercover officer and unsworn alleged statements of the informant, as to the probable cause issue, the Court erroneously cited and relied upon them for the truth of the matters asserted in findings of fact and conclusions of law. That application and affidavit had only been admitted for basic evidence related to probable cause, "General Warrant", and seizure issues. To do so is reversible error.

VII. THE COURT OF APPEALS WRONGFULL VACATED THE DISTRICT COURT JUDGMENT ENTERED BY USE OF F.R.C.P. 15(b) IN DISTRICT COURT BY RELIANCE ON F.R.C.P. 54(c) FINDING AN ABUSE OF DISCRETION AND ORDERING DISMISSAL OF COUNT THREE

The District Court found that having jurisdiction to decide the 42. U.S.C. §1983 issue in Counts One and Two, that it had supplemental jurisdiction over the Count Three State law

"conversion" claim for the seized property under 28, U.S.C. §1367(a). Subsequently in its decision on Frederick City's motion to alter or amend was denied since the City neglected to address or defend the conversion evidence as proven at trial where the factual allegations clearly showed a State law conversion claim was being pressed and the evidence at trial was clearly directed at such a claim. Petitioner had alleged the State claim facts were clearly intertwined with the federal ones being tried.

The District Court applied F.R.C.P. 15(b) providing that issues not raised by the pleadings but tried by . . . implied consent of the parties, they shall be treated as raised in the pleadings and if necessary subsequent amendments of the pleadings are allowed to conform the pleadings to the issues tried, citing Campbell v. Trustees of Stanford University, 817 F.2d 499 (CA 9, 1987), Quillen v. Int'l Playtex, Inc., 789 F.2d 1041 (CA 4, 1986) and 3 J. Moore, Moore's Federal Practice, §15.13 [2] (2nd ed. 1985).

The Trial Court rejected the need to specifically include the term "conversion" and the actual citations for supplemental jurisdiction in the body of the formal complaint, citing this Court's decision of Conley v. Gibson, 355 U.S. 41, 48.

The Court of Appeals citing Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895 held that the correct rule to apply was F.R.C.P. 54(c) determining that a de facto trial could not be implied where unfairly prejudicial, citing Albemarle Paper Co., v. Moody, 422 U.S. 405, 424 as authority for the Fourth Circuit holding to that effect Gilbane, supra. Finding this a prejudicial surprise Trial Court ruling under Quillen, supra. It

cited Rodriguez v. Doral Mtg. Corp., 57 F.3d 1168 (CA 1, 1995).

Petitioner concedes that the term "conversion" was not in the title of Count Three but was by allegations of fact, set out in the body of the complaint in para. 40. Also, as determined by the Trial Court the City never claimed surprise as to the conversion claim and in fact early on it made the statement that the claim was merely a State law "conversion" claim in its initial trial brief. This is clearly contrary to the Court of Appeals findings.

Petitioners pleadings must be contrued to do substantial justice (F.R.C.P. 9(f). By F.R.C.P. 8 a complaint pleading are liberally construed as "Notice Pleading" and need not set out facts in detail but sufficient facts to outline a cause of action. New Amsterdam Cas. Co. v. Waller, 323 F.2d 20 (CA 4, 1974), Thompson v. Allstate Insur. Co., 476 F.2d 746 (CA 5, 1973). The cause of action here gave notice, was not a surprise, produced no claim of prejudice, was factually sufficient and a technical ommission occurred. Conley v. Gibson, 335 U.S. 41, 48.

Thus the Court of Appeals erred in vacating the judgment and ordering the District Court to enter a dismissal order effectively denying any and all relief, even under 42. U.S.C., §1983 (by its summary affirmance of the District Court without any standards of review applied) and published the outcome for other Courts to follow.

CONCLUSION

This Court is respectfully requested to issue its Write of Certiorari to review the decisions rendered below and thereupon

reverse the Court of Appeals summary affirmance of the Trial Court decision and procedural reversal as to substantive law issues, as well as review and vacate the District Court decision on Counts One and Two.

Petitioner is presenting compelling reasons, factually supported on an important federal matter in which the Court of Appeals, and the District Court, has rendered its judgment to guide all Fourth Circuit Courts, and State Court considerations, hereafter, which is in direct conflict with long held constitutional rulings, judgments, and mandated procedural requirements, in deprivation actions under the First and Fourth Amendment and 42, U.S.C., 1983.

Unless corrected police officers may make their own findings of probable cause of obscenity and only on that basis cause a warrant to issue not particularly describing any publication or personally determine what to seize.

If review and reversal is not forthcoming on this published opinion, the Fourth Circuit and the District Court of Maryland has effectively nullified this Courts numerous constitutional rulings in a long line of decisions, and did so by summary affirmance.

Respectfully requested,

William E. Seekford, Esq.
9924 Pepper Hill Road
Perry Hall, Maryland 21128
(410) 529-0422
(410) 529-6743 (Fax)

APPENDIX

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PINKLEY, INCORPORATED, t/a Bradley Books,

Plaintiff-Appellee,

v.

CITY OF FREDERICK, MARYLAND, a Body Politic,

Defendant-Appellant,

and

ROBERT A. SERVACEK, Individually and in his official capacity as Detective in Frederick City Police Department and City of Frederick, Maryland; RICHARD J. ASHTON, Major, Individually and in his official capacity as Chief, Frederick City Police and Agent, Servant, Employee and Policy maker of City of Frederick, Maryland; THE MAYOR AND BOARD OF ALDERMAN OF FREDERICK, MARYLAND, CONSTITUTING AND ACTING AS THE CITY OF FREDERICK, MARYLAND, a Body Politic; DAVID S. GEARINGER, Officer, Individually and in his official capacity as agent of Frederick City, Maryland; JOHN LAMMERS, Officer, Individually and in his official capacity as agent of Frederick City, Maryland; SHAWN MARTYAK, Officer, Individually and in her official capacity as agent of Frederick

City, Maryland,

Defendants.

PINKLEY, INCORPORATED, t/a Bradley Books,

Plaintiff-Appellee,

v.

CITY OF FREDERICK, MARYLAND, a Body Politic; ROBERT A. SERVACEK, Individually and in his official capacity as Detective in Frederick City Police Department and City of Frederick, Maryland; RICHARD J. ASHTON, Major, Individually and in his official capacity as Chief, Frederick City Police and Agent, Servant, Employee and Policy maker of City of Frederick, Maryland; DAVID S. GEARINGER, Officer, Individually and in his official capacity as agent of Frederick City, Maryland; JOHN LAMMERS, Officer, Individually and in his official capacity as agent of Frederick City, Maryland;

Defendants-Appellees,

and

THE MAYOR AND BOARD OF ALDERMAN OF FREDERICK, MARYLAND, CONSTITUTING AND ACTING AS THE CITY OF FREDERICK, MARYLAND, a Body Politic; SHAWN MARTYAK, Officer, Individually and in her official capacity as agent of Frederick City, Maryland,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Edward S. Northrop, Senior District Judge.
(CA-93-397-N)

Argued: June 3, 1997

Decided: August 31, 1999

Before WIDENER and WILLIAMS, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Judge Widener wrote the opinion, in which Judge Williams and Senior Judge Phillips joined.

COUNSEL

ARGUED: Howard J. Schulman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for Appellant. William Edward Seekford, Towson, Maryland, for Appellee.

OPINION

WIDENER, Circuit Judge:

On February 7, 1990 police officers of the Frederick, Maryland Police Department executed a search warrant at Pinkley, Inc.'s store known as Bradley Books, an adult bookstore. They confiscated allegedly obscene press and speech materials and relevant audio-visual devices and temporarily closed down the establishment.

Pursuant to 42 U.S.C. § 1983 Pinkley brought a three-count complaint in the United States District Court for the District of Maryland alleging that the seizure had deprived Pinkley of its constitutional rights under First, Fourth, and Fourteenth Amendments, and had caused a "loss of property and profit" through "wrongful unconstitutional conduct". The district court found that Pinkley's constitutional rights were not violated by the seizure, but entered judgment against the City for the stipulated value of the property, $20,775.41. The parties appeal that decision.[1] We vacate the judgement for conversion against the city and affirm the district court's denial of Pinkley's constitutional claims.

I. *Background*

---

[1]Pinkley, Inc. Named as defendants the City of Frederick, Maryland and several city officials. Although only defendant City of Frederick had occasion to appeal the money judgement against the City, Pinkley's notice of cross-appeal of the constitutional claims names as the cross-appellees the "City of Frederick; Robert A. Servacek; Richard Ashton; David S. Gearinger; and John Lammers." The four named individuals were members of the Frederick Police Department.

On September 19, 1989 Terri Heger, a resident of Frederick, Maryland, filed a complaint with the City of Frederick Police Department alleging Bradley Books was selling obscene materials. The State's Attorney for Frederick authorized an investigation under the auspices of Corporal Servacek, a detective in the Department's Criminal Investigation Division. Sometime around December 26, 1989 Detective David S. Gearinger began undercover operations at the bookstore.

Based on that investigation, by February 1, 1990 Corporal Servacek had drafted an application and affidavit for a search warrant of Bradley Books, which averred that there was probable cause to believe that Pinkley was displaying and distributing obscene materials, primarily magazines and videos, in violation of the Maryland Criminal Code. The application, fifteen pages in length, described the investigation and the adult nature of the materials and activities at Bradley Books. Both Police Chief Ashton and State's Attorney Dorsey reviewed the application and on February 5, 1990 Corporal Servacek presented the application to a judge of the District Court of Maryland for Frederick County. The judge reviewed the warrant application and issued a search warrant.

Corporal Servacek executed the warrant on February 7, 1990 with a search and seizure team of the Frederick City Police Department, which included defendant Officer Lammers. It was Corporal Servacek who determined which materials were to be seized by assessing whether each item fell within the definition of obscene as set forth in the warrant application. The other officers assisted in the removal of the materials, but did not participate in the selection of items. In conjunction with the seizure, Corporal Servacek prepared an inventory sheet and a

property record form for the police department, itemizing the property seized. The store was closed by the officers, for they arrested the sole employee present at the time, bookstore manager Paul G. Sobus.

That same day Sobus was charged with violating 27 Md. Ann. Code §416D (knowingly displaying for advertising purposes pictures, photographs, drawings, etc. depicting sadomasochistic abuse, sexual conduct and sexual excitement), 27 Md. Ann. Code §418 (knowingly exhibiting, distributing and offering to distribute obscene matter), and 27 Md. Ann. Code §421 (promoting the sale and distribution of obscene material). To these charges was added, on February 21, 1990, the charge of maintaining a bawdy house in violation of 27 Md. Ann. Code §15(a).

On February 9, 1990 Bradley Books through its counsel sent a letter to Police Chief Ashton demanding the return of the seize materials and equipment. The letter requested an adversary hearing and advised plaintiff would "seek redress" if the materials were not returned by February 12, 1990. Chief Ashton relayed the letter to the State's Attorney's Office, Mayor Paul Gordon received an identical letter, which he forwarded to Chief Ashton. Plaintiff's counsel did not seek any formal hearing in a court, and no such hearing was ever scheduled or held.

On June 18, 1990 Sobus pleaded guilty both to violating §418 -- knowingly exhibiting, distributing and offering to distribute obscene matter -- and to maintaining a bawdy house. During that plea Sobus and his counsel agreed with the State's proffer that the following would have been proven by the State:

> Materials that were taken on that day included magazines and books and video tapes which portrayed sexual conduct in what would be seen as a patently offensive manner to the average person *buying* (sic) contemporary community standards. In addition Your Honor it would be found that in viewing these materials that they appeal to the prurient interest in sex and that they do not in any way serve a serious literary, artistic, political, or scientific purpose.

Although no obscenity charges were filed against Pinkley or Bradley Books, as the district court noted "[d]uring his plea, Mr. Sobus acknowledged that Bradley Books was a bawdy house where men engaged in sodomy and unnatural sexual acts in violation of State criminal laws." That appeared to be the end of the matter as far as the City was concerned. No other charges were filed against Pinkley connected with the bookstore, and within a few days it had reopened. The magazines, videos, VCRs and other materials were retained in the police department's evidence room.

At all relevant times the Frederick Police Department's practice regarding evidence was to provide notice to property owners of seized property after the conclusion of a case or investigation. The notice served to alert the owners that the police department had possession of the property, and that if the property was not claimed within six months of receipt of the notice, the department would consider the property to be unclaimed and subject to disposal. Additionally, subject to the approval of the police chief, the department allowed its officers to acquire unclaimed property.

In late 1990 Sergeant Steven Tuel was assigned the duty of Identification Section assistant, pursuant to which he was to assist Lieutenant Alice Moore in cataloging and purging the various articles of evidence and property which had accumulated over time in the department's custody. In the process of cataloging he encountered the evidence seized from Bradley Books, which included magazines, books, videotapes, video players, televisions, and like equipment. Sgt. Tuel consulted with Cpl. Servacek regarding the status of the case. In turn, Cpl. Servacek asked the State's Attorney Shelly Barrett, who had assisted in the prosecution of Sobus, whether the materials could be disposed. Upon receiving no response, Sgt. Tuel advised Lt. Moore that he had not received an answer. Subsequently, Lt. Moore prompted Chief Ashton to make a similar inquiry to State's Attorney Dorsey, which met with a like result. A month later the matter again went up the chain of command in the police department. Finally, after about a year, Sgt. Tuel visited the Office of the State's Attorney and spoke with Assistant State's Attorney Don Grossnickle regarding the disposal of the Bradley Books property. Shortly thereafter, State's Attorney Dorsey called Sgt. Tuel and advised him that he could dispose of the evidence.

On October 14, 1991 Corporal Servacek sent a memorandum to Chief Ashton requesting permission to take possession for his personal use some of the Bradley Books property that had not been claimed, pursuant to the department's policy. Both officers believed that the property, unclaimed some 16 months after Sobus's guilty plea, had been abandoned. However, the police department had not notified Bradley Books that it could retrieve any of its property.

Sometime thereafter, Cpl. Servacek claimed a number of television sets and video players for his personal use. He believed that they were in poor condition, and that he was unable to make repairs to make them operational. The police department also retained one video player and television to use for showing training videos. Ultimately, at an uncertain date, Sgt. Tuel on his own initiative decided to dispose of the remaining books and films at the city landfill. He mistakenly believed that the materials had been declared contraband in the course of Sobus's guilty plea. Defendants were not aware of his action at the time.

II. *Procedure*

On February 5, 1993 Pinkley, Inc filed a three-count complaint against the City of Frederick and the various officials named above. The complaint alleged jurisdiction pursuant to 28 U.S.C. §§1331, 1343(a)(3) and (a)(4), and 42 U.S.C. §§1983 and 1988 for alleged violations of Pinkley's rights under the First, Fourth, and Fourteenth Amendments. Following a general statement, the three counts were captioned as follows.

> *COUNT ONE*
>
> (Wrongful unconstitutional prior restraint and abridgment of plaintiff's *First* and *Fourteenth Amendment* civil rights of dissemination by defendants's seizure) . . . .
>
> *COUNT TWO*
>
> (Wrongful unreasonable search and seizure by warrant and abridgement of plaintiff's *Fourth* and *Fourteenth Amendment* rights with respect to

First Amendment materials) . . . .

COUNT THREE
(Loss of Property, profit, etc.) . . . .

Count Three incorporated the allegations of all the preceding paragraphs by reference, and then stated that the defendants

> have seized and taken away plaintiff's personal property and equipment and depriving it of the possession and value thereof without lawful authority or reasonable compensation and have refused to return, replace or provide adequate compensation for the same. Further that the plaintiff has been wrongfully deprived of the foreseeable profit from such property through exhibition, sale and rental.

The next paragraph stated "[t]hat such wrongful unconstitutional conduct engaged in by defendants was done knowingly, intentionally and maliciously."

Following a two day bench trial the district court entered a final judgment against the plaintiff and in favor of all the defendants as to Counts One and Two of the Complaint. On Count Three, the court entered judgment against the City of Frederick only (and not the individual defendants) in an amount stipulated by the parties, $20,775.41. On January 26, 1996 the City of Frederick filed a Motion to Alter or Amend the Judgment, and Pinkley did the same on February 5, 1996. The district court denied both motions in orders of March 5, 1996. The plaintiff filed a supplementary Motion to Alter or Amend

and/or Grant Relief from the March 5 order, which was denied March 11. The City has appealed and the plaintiff has cross-appealed.

III. *Conversion Claim*

The City of Frederick appeals the district court's conclusion that under Count Three the plaintiff could recover under a state cause of action for conversion, and that the court had supplemental jurisdiction over that claim. Following the trial, the district court's initial order briefly stated that the court had supplemental jurisdiction over the claim under 28 U.S.C. §1367(a) and that judgment on Count Three would be entered against the City of Frederick for the fair market value of the property at the time of seizure because the defendants "do not dispute that they failed to five proper notice to Plaintiff concerning the need to claim the seized Bradley Books materials in contravention of . . . [city and police policy]. As such, defendants wrongfully deprived the Plaintiff of this property." A principal difficulty is that §1367(a) or supplemental jurisdiction had not been mentioned in the case until after the trial.[2]

In response to the City's Motion to Alter or Amend the

---

[2]It is true that the plaintiff's post-trial brief refers to Count Three as a pendent count but described the loss as due to unconstitutional seizure, conversion and destruction of the property without just compensation. It also describes Count III as one of substantive due process.

Judgment the court in its order of March 4, 1996 explained its initial ruling on Count Three. The court explained that although the plaintiffs had not included the terms "supplemental jurisdiction," "negligence," or "conversion" in the complaint, and that even though the amended pretrial order did not specify a claim for conversion, the court had presumed in its initial Findings of Fact and Conclusions of Law "the parties' implicit understanding that a claim for conversion remained at issue during trial." The court acknowledged in a footnote that the parties "did not expressly address this issue [of conversion]" but noted that the defendants twice in their arguments insisted that the plaintiff's complaint was really a conversation claim.

Our review of the district court's opinion necessarily begins with the basic premises of federal jurisdiction. Federal courts are courts of limited subject matter jurisdiction, and as such there is no presumption that the court has jurisdiction. See *Lehigh Mining & Manufacturing Co. v. Kelly*, 160 U.S. 337, 327 (1895). Thus the facts providing the court jurisdiction must be affirmatively alleged in the complaint. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936) (holding "the party who seeks the exercise of jurisdiction in his favor . . . must allege in his pleadings the facts essential to show jurisdiction"); *Dracos v. Hellenic Lines Ltd.*, 762 F.2d 348, 350 (4th Cir.) ("plaintiffs must affirmatively plead the jurisdiction of the court"), *cert. denied*, 474 U.S. 945 (1985). To this end Federal Rule of Civil Procedure 8(a)(1) requires that pleadings setting forth a claim for relief provide "a short plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." Fed. R. Civ. P. 8(a)(1). See 13 Wright, Miller & Kane, *Federal Practice and Procedure*,

§3521 (1984).

This said, there is some authority that in the absence of an affirmative pleading of a jurisdictional basis a federal court may find that it has jurisdiction if the facts supporting jurisdiction have been clearly pleaded. "The pleading can either refer to the appropriate jurisdictional statute or contain factual assertions that, if proved, establish jurisdiction." 2 *Moore's Federal Practice* §8.03[3] (3rd ed. 1997). Accordingly, the only way that the district court could have a basis to invoke its supplemental jurisdiction and provide relief for the plaintiffs under an unpleaded state law conversion claim is if the plaintiff had actually tried that claim before the court.

The district court found that Fed. R. Civ. P. 15(b) governed the question of whether the issue of conversion, through the evidence adduced at trial, had been put before the court by the parties.[3] The court relied on Rule 15 because "[t]he

---

[3]Rule 15(b) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues.

Fed. R. Civ. P. 15(b).

purpose of Rule 15(b) is to allow an amendment of the pleadings to bring them in line with the actual issues upon which the case was tried."

We do not agree with the district court's reliance on Rule 15(b). Federal Rule of Civil Procedure 54(c), which provides in pertinent part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings", more properly governs the situation at hand. Fed. R. Civ. P. 54(c).

Gilbane Building Company v. Federal Reserve Bank of Richmond, 80 F.3d 895, 901 (4th Cir. 1996), controls that aspect of this case. In *Gilbane* we explained that amendment pursuant to Rule 15(b) requires that the "evidence at the hearing proved facts not encompassed by its initial pleadings." 80 F.3d at 901. But when the question is "whether the allegations properly pled and proven support a theory and type of relief not specified in [the plaintiff's] demand for judgment . . . [t]hat issue is controlled by Rule 54(c)." *Gilbane*, 80 F.3d at 901. As in *Gilbane*, the facts proven at trial here were properly pled and proven, but the demand for judgment for conversion now made was not fairly specified for trial under the supplemental jurisdiction of the district court.

Rule 54© does not support the district court's implicit decision that a state-law conversion claim had been *de facto* tried by the parties. According to the precedents applying Rule 54(c), alternative relief is not permitted where it would be unfairly prejudicial. *Gilbane*, 80 F.3d at 901 (relying on *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975)). Moreover, as

the First Circuit stated under similar circumstances "the rule permits relief predicated on a particular theory 'only if that theory was squarely presented and litigated by the parties at some stage or other of the proceedings.'" *Rodriquez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1173 (1st Cir. 1995) (quoting *Evans Prods. Co. v. West Am. Ins. Co.*, 736 F.2d 930, 923-24 (3rd Cir. 1984)). Here, where the plaintiff failed to plead a conversion theory, and where the surprise ruling patently prejudiced the defendants, as we set forth below, Rule 54© does not support the district court's decision to invoke supplemental jurisdiction on its own initiative.

We now explain why Rule 54(c) should control the Rule 15(b) is an unsatisfactory basis for judgment for the plaintiff on an unpleaded conversion theory of recovery.

We review the trial court's determination under Rule 15(b) for abuse of discretion. *Elmore v. Corcoran*, 913 F.2d 170, 172 (4th Cir. 1990). It is well established that Rule 15(b) applies only if two requirements are met. "Because notice to the defendant of the allegations to be proven is essential to sustaining a cause of action, Rule 15(b) applies only when the defendant has consented to trial of the non-pled factual issues and will not be prejudiced by amendment of the pleadings to include them." *Gilbane*, 80 F.3d at 901.

We are of opinion that the district court abused its discretion by deeming the complaint amended under Rule 15(b) to include a conversion claim. In *Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986), we recognized the restraint on Rule 15(b) that "a court will not imply consent to try a claim merely because evidence relevant to

a properly pleaded issue incidentally tends to establish an unpleaded claim." The instant case presents the same situation which *Quillen* warned against -- appellate relief because the evidence offered to support a properly pleaded claim coincidentally supports an unpleaded theory of recovery. *Quillen*, 789 F.2d at 1044. Indeed, the district court acknowledged that the plaintiff's evidence which supported a conversion claim "was also directed towards the establishment of the Plaintiff's due process claims."

The record lends no support for either of these findings by the district court. Not only did the plaintiff never invoke the court's supplemental jurisdiction or raise the conversion cause of action at any time in the proceedings, at one point, as we detail below, the plaintiff affirmatively denied that there was any claim at issue "for recovery of property or its value."[4] Further, amendment pursuant to Rule 15(b) was not proper here where the defendant never conceded implicitly or explicitly that a conversion claim was at issue.

Our review of the record begins with the complaint itself. Rule 8(a)(2) provides the threshold requirements that a claim for relief shall contain "(1) . . . the grounds upon which the court's jurisdiction depends, . . . (2) a short plain statement of the claim showing that the pleader is entitled to relief . . . . and (3) a demand for judgment." Fed. R. Civ. P. 8(a)(2). With regard to a claim for conversion, Pinkley's complaint fails two of these basic requirements. First, nowhere in the complaint does the

---

[4]See note 2, *supra*.

plaintiff invoke the supplemental jurisdiction under 28 U.S.C. §1367(a), a prerequisite for jurisdiction of a pendent or ancillary claim. Second, the complaint nowhere states there is a claim under state law for conversion, the relief granted and now sought. While the third count bears the title "loss of property, profit, etc." the body of that count alleges that the taking was "wrongful unconstitutional conduct." Thus it as much or more closely follows the constitutional claims of the two preceding counts, and thereby failed from the outset to give the defendants fair notice that they might be facing a conversion claim.

We recognize that even where the pleadings initially do not provide notice of a claim, it is possible, as the district court noted, under Rule 15(b) for a claim to be put into issue at trial if "the issues not raised in the pleadings have been tried by the parties' express or implied consent." *Quillen*, F.2d at 103. Here, however, the record indicates that the defendant never acceded to the conversion claim, either expressly or implicitly.

Our conclusion that the conversion claim was never properly at issue as the case proceeded is supported by the pretrial order. Federal Rule of Civil Procedure 16(e) provides that the pretrial order "shall control the subsequent course of action."

The pretrial order was submitted jointly by the parties and lists under a separate heading "Legal Theories relied upon by Plaintiff in each claim." It then sets out in seven numbered paragraphs, 1-7 inclusive, its legal theories for recovery. The order sets forth only theories sounding in the First, Fourth and Fourteenth Amendments to the Constitution. It nowhere mentions a claim for conversion or any state or pendent claim.

Thus, even if the plaintiff initially had a colorable argument that Count Three of the complaint had somehow stated a conversion claim, the failure to include a conversion claim in the pretrial order would have removed it from issue.

As the proceedings advanced, there was nothing in the record to show that the plaintiff introduced a claim for conversion. The plaintiff's trial brief, consistent with the earlier pleadings and pretrial order, alleges violations of the plaintiff's rights under the First, Fourth and Fourteenth Amendments, but none of the nine issues states presents a state conversion claim. At this point we note that the word "convert" is used in question 3(j) with relation to a "federal constitutional" claim, and the word "conversion" in question 8 with relation to punitive damages. Moreover, the defendants' trial brief, rather than somehow implicitly admitting that conversion was part of the trial, does the opposite. The defendants' brief states that although the plaintiff is alleging federal constitutional violations, really all the plaintiff has is the possibility of a state conversion claim, which should appropriately have been brought in a state court. "This case, at best, is a conversion case that belongs in State court, where plaintiff can pursue adequate remedies." To take this as acceding to the litigation of a conversion claim is surely a misunderstanding of the language used.

Defendants note that throughout the trial itself, they never conceded that a state conversion claim was at issue in the trial. They observe that the plaintiff in its opening statement did not mention a conversion, state-law, or pendent claim. Further, at the close of the plaintiff's case, in the defendants' motion for judgement, the defendants explicitly stated that there were no state claims at issue.

> It's our position in this case, very specifically, in framing a motion for judgment at this time, that there are two prongs that the plaintiff has alleged. The first prong is the First Amendment prong of this case. The second is the due process prong. *There are no state law claims in this case.*

(Emphasis added). Neither the plaintiff nor the court took issue with the defendants. The defendants' counsel continued by addressing the constitutional claims, stating:

> I think plaintiff has an argument in state court. I think there's factual components to dispute that, but they have an argument that the property was converted. But, they don't have a constitutional claim for due process . . . .

The plaintiff's rebuttal to this was not to assert it was also stating a conversion claim, but rather was limited to an argument as to the principles underlying the constitutional claims. Plaintiff did not suggest it was entitled to judgment under a conversion claim, and at no point did the plaintiff seek to amend its complaint.

The City also properly argues it was prejudiced by the fact that it had several defenses under state law to a conversion claim which, of course, it did not present in the district court because the issue was not tried. Among them are questions of damages; abandonment; contraband; notice; timeliness; and negligence or nonfeasance in performing a governmental function. While we express no opinion on the validity of any of such defenses, we leave them to the state courts and mention them only to acknowledge that they have arguable merit, and the

denial of an opportunity to present them was prejudicial.

Finally, the plaintiff's post-trial memorandum states explicitly:

> This is not a complaint for recovery of property or of its value but it is based on defendant's abridgement of fundamental constitutional rights.

We agree with the First Circuit that "[i]t would not serve the interests of justice . . . to redeem a totally unpleaded, unlitigated claim in circumstances that threaten significant prejudice to a defendant." *Rodriguez*, 57 F.3d at 1171.

IV.

Pinkley claims error in the district court's judgment in favor of all of the defendants on Counts One and Two of the complaint. That judgment is affirmed for the reasons stated by the district court in its opinions.

Pinkley also claims error in the district court's failure to enter judgment against the defendants Servacek, Gearinger, Lammers and Ashton as to Count Three of the complaint. Because the district court had no jurisdiction to decide Count Three of the complaint, the dismissal of Count Three of the complaint on remand without prejudice for lack of jurisdiction will also apply to those four defendants, and any claim of error with respect to any failure to enter judgment against them is moot.

In summary, the judgment of the district court is affirmed

as to its action with respect to Counts One and Two of the complaint.

As to Count Three of the complaint, the judgment against the City under state law for conversion, the district court, while may have had at the beginning of the case the right to assert its supplemental jurisdiction under 28 U.S.C. §1367(a) if properly developed, even though not initially claimed in the complaint, in view of the agreed upon pre-trial order which removed that issue from the case, even if present; the post-trial memorandum of the plaintiff; the positions the parties took during this proceeding in the district court; and the prejudice to the defendant which is apparent from the record; we are of opinion the district court abused its discretion in considering the merits of this supplemental or pendent claim under state law.

The judgment of the district court in favor of the plaintiff on Count Three of the complaint is vacated, and on remand the district court will dismiss Count Three of the complaint without prejudice for lack of jurisdiction.

No. 96-1447 - VACATED AND REMANDED WITH INSTRUCTIONS

No. 96-1448 - AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 22, 1999

No. 96-1447
CA-93-397-N

Pinkley, Inc. v. City of Frederick MD

No. 96-1448
CA-93-397-N

Pinkley, Inc. v. City of Frederick MD

MANDATE

The judgment of this Court dated 8/31/99 takes effect today.

PATRICIA S. CONNOR
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PINKLEY, INC., T/A "BRADLEY BOOKS"	*	
v.	*	Civil Action No. N-93-397
ROBERT A. SERVACEK, et al.	*	

* * * * * * * * *

MEMORANDUM

I. INTRODUCTION

This civil rights case was heard by this Court during a November 29-30 bench trial on the three counts set forth in Plaintiff's Complaint.[1] Plaintiff Pinkley, Inc., a Maryland

---

[1]Count I of Plaintiff's Complaint alleges "wrongful unconstitutional prior restraint and abridgment of Plaintiff's First and Fourteen Amendment civil rights of dissemination by Defendants' seizure." Complaint at 12. Count II alleges "wrongful unreasonable search and seizure by warrant and abridgment of Plaintiffs' Fourth and Fourteenth Amendment rights with respect to First Amendment materials." Id. Count III alleges "loss of property, profit, etc." Id. At 13. Plaintiff also seeks a declaratory judgment with respect to its rights to

corporation trading under the name of Bradley Books, brings this case pursuant to 42 U.S.C. §1983 against the Defendant City of Frederick, Maryland, four of the City's police officers, Defendant Officers Robert A. Servacek, David S. Gearinger, John Lammers and Shawn Martyak.[2] 1990 execution of a search and seizure warrant at Bradley Books violated its First, Fourth and Fourteenth Amendment rights. Plaintiff also contends that Defendants violated its due process rights in October 1991 when they converted Plaintiff's seized property to Defendants' own use in contravention of state and municipal law.

After considering the evidence and testimony presented by the parties, together with their post-trial submissions, the Court finds that Plaintiff has failed to show the presence of a constitutional violation as required under 42 U.S.C. §1983. Accordingly, judgment will be entered in Defendants' favor as to Counts I and II. Judgment as to Count III will be entered in Plaintiff's favor. This Memorandum will constitute the Court's Findings of Fact and Conclusions of Law as provided by Fed. R. Civ. P. 52(a).

---

disseminate First Amendment expression materials.

[2]At the commencement of trial, Defendants indicated that Officer Shawn Martyak was wrongly named as a Defendant because he did not participate in the search and seizure at issue. Plaintiff did not challenge this contention. As such, Defendant Officer Shawn Martyak will be dismissed from this case.

II. FINDINGS OF FACT

1. Plaintiff Pinkley, Inc. operates a business trading as "Bradley Books" that sells "adult" books, magazines and video cassettes. Bradley Books also provides on-site viewing of "adult" motion picture films and video cassettes at its 318 N. Market Street location in Frederick, Maryland. Plaintiff has operated this business for roughly twenty years.

2. The Defendant City of Frederick, Maryland is a municipal body Defendant Richard Ashton, formerly Chief of the Frederick City Police Department,[3] is sued in his individual and official capacities as alleged "criminal law enforcement policy maker and policy decision maker and implementer (sic), agent, servant and employee of the City defendant as well as supervisor of Frederick City police (sic) employees."[4] Defendant Police Officers Servacek, Gearinger and Lammers are sued in their individual and official capacities as agents, servants, and employees of the City of Frederick and Defendant Ashton.[5]

3. On or about September 19, 1989, the City of

---

[3]Defendant Ashton retired from the Police Department on or about December 31, 1991.

[4]See Plaintiff's Complaint at ¶ 11.

[5]Id. at ¶ 12.

Frederick Police Department ("Police Department") was contacted by Teri Anita Heger, a representative of a local organization named "Concerned Women of Frederick." Ms. Heger filed a complaint with the Police Department alleging that the content of certain materials being sold at Bradley Books was obscene; she also contended that there was reason to believe that various forms of sexual activity were occurring on the premises of Bradley Books.[6]

4. Ms. Heger's complaint was taken by Defendant Corporal Robert A. Servacek, a detective with the Police Department's Criminal Investigation Division. Corporal Servacek is a criminal investigator whose specialty is violent crimes and sexual assaults. He has no prior experience in the investigation of obscenity crimes or "adult" establishments, nor any has he received any particularized training in First Amendment law. Corporal Servacek explained to Ms. Heger that he would contact the Frederick County State's Attorney's Office for an opinion as to whether an investigation should be initiated.[7] He also wrote up a report reflecting Ms. Heger's complaints.[8]

---

[6]See Plaintiff's Exhibit 14 at I.

[7]Id.

[8]Id. As shown in Plaintiff's Exhibit 14, each time that Corporal Servacek worked on a phase of the investigation of Bradley Books, he recorded his findings on a Police Department Form #172 "Supplement" that was submitted to a supervisor for

5. Corporal Servacek first telephoned the Frederick County State's Attorney's Office on September 25, 1989. He was told by a member of that office that some research had to be undertaken with respect to the definition of "obscene."[9]

6. Thereafter, Corporal Servacek communicated with the State's Attorney's Office at least ten additional times between the period of September 25, 1989 and December 1, 1989 with respect to the issue of whether an investigation of Bradley Books was to be pursued.[10] He did not receive an immediate answer because members of the State's Attorney's Office had not completed their review of the pertinent case law.[11]

7. Corporal Servacek testified that he also did some research on his own with respect to finding a "working" definition of "obscene." He testified that he reviewed the main volume of Article 27 of the Maryland Code, Sections 416A, 416D, 418 & 421, together with the annotations accompanying these sections.[12] Corporal Servacek did not conduct any other

---

review.

[9]Id., Supplements 2-4.

[10]See Plaintiff's Exhibit 14.

[11]Id.

[12]Section 416A is entitled "Definitions" and provides meanings for the following terms: (a) "Advertising purposes;" (b) "minor"; © "sadomasochistic abuse"; (d) "sexual conduct"; and (e) "sexual excitement".

Section 416D is entitled "Displaying certain visual representations for advertising purposes" and provides:

> (a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items.
>
> (b) Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it. (1971, ch. 494.)

Section 418 is entitled "Sending or bringing into State for sale or distribution; publishing, etc., within State" and provides:

> Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes; or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. (1967, ch. 394, 1; 1978, ch. 21.)

legal research. He did not read the text of any of the cases listed in the annotations.[13]

8. During his research, Corporal Servacek found that the annotations accompanying Section 418 recited a three-prong definition of the term "obscene." He testified that he used this three-prong definition as a guideline in his investigation of the complaint against Bradley Books.

9. On October 29, 1989, Corporal Servacek interviewed John Arthur Bischoff, a former manager of Bradley Books,[14] who has been identified by Corporate Servacek as the

---

Section 421 is entitled "Obscene advertising" and provides:

> Every person who knowingly writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor. (1967, ch. 394, 1.)

[13]These cases included Adler v. Pomereau, 313 F. Supp. 277 (1970); Randall Books v. State, 64 Md. App. 589 (1985), cert. denied, 480 U.S. 940 (1987); Smiley v. State, 294 Md. 461 (1982).

[14]Mr. Bischoff worked as manager of Bradley Books from July 1980 through September 1982. Plaintiff's Exhibit 14,

confidential informant referred to in the underlying Application and Affidavit for Search & Seizure Warrant.[15] Mr. Bischoff gave Corporal Servacek a fairly detailed summary of Bradley Books' inventory. He also claimed that certain sex acts were being performed in the store's video viewing booths.[16] For example, Mr. Bischoff told Corporal Servacek that oral sex had been performed on him in a Bradley Books viewing booth on October 21, 1989.[17]

10. A formal investigation of Bradley Books was authorized by Frederick County State's Attorney Lawrence A. Dorsey on December 1, 1989. At or about that time, Corporal Servacek designated Defendant Police Officer David S. Gearinger as an "undercover" police officer whose duty was to visit Bradley Books to make certain purchases and for purposes of observation.

11. Corporal Servacek also met with Mr. Bischoff again on December 3, 1989 and December 13, 1989. At Corporal Servacek's request, Mr. Bischoff visited Bradley Books on December 3, 1989. He informed Corporal Servacek that

---

Supplement 9.

[15]See Plaintiff's Exhibit 9.

[16]These activities were enumerated in the Application and Affidavit for Search & Seizure Warrant. Plaintiff's Exhibit 9 at 3-4.

[17]See Plaintiff's Exhibit 14, Supplement 9.

Bradley Books was showing various video cassettes in its viewing booths that depicted explicit sexual acts.[18]

12. On December 22, 1989, Corporal Servacek introduced Officer Gearinger to Mr. Bischoff, who then briefed both officers as to the general operations of Bradley Books.

13. On December 26, 1989, Officer Gearinger began the first of a series of undercover visits to Bradley Books.[19] During these visits, Officer Gearinger collected various evidence that was sent to a laboratory to be tested for the presence of semen. Officer Gearinger also viewed various video cassettes and purchased a number of written materials and several video cassettes.[20]

14. On February 1, 1990, Corporal Servacek prepared a fifteen-page draft Application and Affidavit for Search & Seizure Warrant (hereinafter "Application"), which averred, inter alia, that there was probable cause to believe that Sections 416D, 418 and 421 of the Annotated Maryland Code (1987 Replacement Volume and 1989 Cumulative Supplement) were being violated at Bradley Books.[21]

---

[18]Id., Supplement 15.

[19]Id., Supplements 17-20, 22-23.

[20]Id., Supplements 17-27.

[21]See Plaintiff's Exhibit 9.

15. The Application recited the actual text, and gave related definitions for Section 416A(c), 416A(d), 416A(e),[22] 416D(a), 418 (in part) and 421 (in part). It also provided the following three-prong definition for the "obscene material" referred to in Section 418:

> (1) The dominant theme of the material taken as a whole appeals to a prurient (lustful) interest in sex,
>
> (2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, and
>
> (3) The material is utterly without redeeming social value . . .[23]

16. The Application also reviewed Corporal Servacek's investigation of Bradley Books. It included an extremely detailed description of the sexual nature of the materials offered for sale or for viewing in the Bradley Books viewing booths.[24]

---

[22]Sections 416A(c), 416A(d), and 416A(e) provided definitions of the terms "sadomasochistic abuse", "sexual conduct" and "sexual excitement" as these terms were used in Section 416D.

[23]Plaintiff's Exhibit 9 at 5.

[24]For example, the Application noted a claim by the former manager (therein identified as a confidential informant)

that continuing sexual activity was taking place in the viewing booths that showed "x-rated videos". The manager claimed that Bradley Books' management was aware that the booths were used by its patrons for masturbation and sexual acts. The manager claimed that the patrons created certain openings between the booths (known as "glory holes") through which a person in one booth would engage in sexual acts with another person located in the adjoining booth. The manager also claimed that store management provided paper towers for the patrons and that store personnel were required to clean semen from the floors, walls and equipment. The manager claimed further that the store's magazines, books and video movies depicted sex acts and on occasion, bestiality.

The Application recounted in explicit detail the results of Defendant Officer Gearinger's undercover visits to Bradley Books on December 26, 27, 1989 and January 3, 8, 10, and 16, 1990. During these visits, Officer Gearinger visited the eight viewing booths and observed the presence of one or more open "glory holes." Officer Gearinger found that the booths offered a selection of eight films that depicted explicit scenes of sexual intercourse, fellatio, cunnilingus and anal intercourse; one of the films also showed a bondage scene. He observed and described numerous books and magazines being offered for sale that depicted sadomasochistic abuse.

Officer Gearinger purchased, inter alia, two magazines which were entitled "Mistress of Domination" and "Proud Mistresses" which were attached to the Application as Exhibits A nd B. He also purchased a video entitled "Jock 18" and two

17. The Application then requested a search and seizure warrant authorizing a search of the Bradley Books premises for the following items:

> 1. Any and all magazines, books, periodicals, pamphlets, literature, and video movies, film that are in violation of the hereinbefore cited sections.
>
> 2. Any and all video cassette recorders and/or instruments that are technically tools of the crime when used to exhibit/display/show films/movies that are in violation of the hereinbefore cited sections.
>
> 3. Any and all evidence that indicates that sexual activity/conduct takes place on the premises, including --

---

magazines entitled "Ass Fucker Cum Sucker" and "Raunchy Ass" which depicted explicit sexual acts. Portions of these publications were attached as exhibits to the Application. Additionally, Corporal Servacek viewed a number of video films and described the explicit sexual acts depicted therein in the Application. In total, the Application contained at least seventeen exhibits depicting explicit sexual acts.

Finally, Officer Gearinger retrieved used condoms, tissues and paper towels from the viewing booths' floor which were sent to Maryland State Police Laboratory for analysis. On January 25, 1990, the Maryland State Police Laboratory Analysis confirmed that a number of these towels taken from the premises proved positive for semen. See Defendants' Exhibit 1.

but not limited to -- paper towels, paper tissues, and condoms.

4. All monies, including cash and coinage, found on the premises that would substantiate that violations of the hereinbefore cited sections have in fact occurred, and are occurring, at the business hereinbefore described.

5. All receipts, invoices, bills and records kept in the ordinary course of business that would identify the owner/ownership of said business, as well as the suppliers of material in violation of the sections hereinbefore cited, that may be kept in locked boxes, safes, storage area, and things in the nature thereof within said business.[25]

18. Corporal Servacek submitted the Application to Defendant Police Chief Ashton, who reviewed and approved the Application for submission to State's Attorney Dorsey. It was State's Attorney Dorsey upon whom the police relied with respect to determining whether the warrant Application set forth probable cause and was technically correct.

19. State's Attorney Dorsey reviewed the Application and gave approval for it to be submitted to a judge for review.

20. On February 5, 1990, Corporal Servacek appeared before the Honorable Frederick J. Bower, a judge of the District Court of Maryland for Frederick County, who reviewed the

---

[25]Plaintiff's Exhibit 9 at 14.

Application, together with its accompanying exhibits. Judge Bowere then issued a three-page Search & Seizure Warrant (hereinafter "Warrant").[26]

21. On February 7, 1990, a search and seizure team of the Frederick City Police Department executed the Warrant at Bradley Books. Accompanying Corporal Servacek were Officers David S. Gearinger, John Lammers and Wendy Martyak.

22. Corporal Servacek testified that he determined which materials should be seized by assessing whether each item fit within the definition of "obscene" as set forth in the Warrant.[27] He examined the covers of each item that he selected. Although some magazines and video cassettes were sealed with clear cellophane, the magazine covers and the cassette jackets depicted explicit sexual acts intended to be illustrative of the contents of the magazine film. See Defendants' Exhibit 4A-4P.

23. At some point during this process, Paul Sobus, the then current manager of Bradley Books, became impatient with the length of time that Corporal Servacek was taking in examining the store's inventory. He volunteered to Corporal Servacek that the officers should take all the materials to the police station in order to complete their examination and

---

[26]Id.

[27]Plaintiff does not contend that Corporal Servacek seized materials other than those so described in the Warrant. To the contrary, Plaintiff contends that the Warrant was overly broad in scope.

inventory.

24. The other Defendant Police Officers did not participate in the selection of the materials, but only assisted in carrying the materials out of the store. Each Defendant Police Officer relied upon the legality of the Warrant. A substantial portion of the contents of the store were examined and removed pursuant to the Warrant. Corporal Servacek also seized a number of television sets, movie projectors and video cassette recorders ("VCR") as being tools of the crimes committed.

25. During the execution of the Warrant, Mr. Sobus was the only employee present on the store's premises. Because Corporal Servacek determined that it was necessary to arrest Mr. Sobus, the former placed a "Closed" sign in the window of the store. Due to a lack of inventory, Bradley Books remained closed for several days.

26. On February 12, 1990, Corporal Servacek made a report and return of the Warrant to Judge Bower. Corporal Servacek also completed an inventory sheet and a property record form for the Police Department, which listed the property seized.

27. On February 9, 1990, William E. Seekford, Esquire, an attorney representing Bradley Books, sent a letter to Defendant Police Chief Ashton seeking the return of the seized materials and equipment. Mr. Seekford requested an adversary hearing and threatened unspecified "redress" if the materials were not return by February 12, 1990. Police Chief Ashton forwarded this letter to the Frederick County State's Attorney's Office. Mr. Seekford also sent an identical letter to May Paul

Gordon, who referred his copy to Police Chief Ashton. Mr. Seekford did not seek a formal hearing in a court of law. No such hearing was ever scheduled or held.

28. On February 7, 1990, the store's manager, Mr. Sobus, was charged with violating Sections 416D, 418 and 421 of Article 27 of the Maryland Annotated Code. Mr. Seekford represented Mr. Sobus in his criminal proceeding until sometime in late May or early June of 1990.[28] On June 18, 1990, Mr. Sobus pled guilty to a violation of Md. Ann. Code Art. 27, §418 and the common law crime of maintaining a bawdyhouse.[29] No obscenity proceedings were ever filed against Plaintiff or Bradley Books.

29. It was the Police Department's practice to notify all property owners in writing that: (I) the Department had possession of teheir property; and (ii) if the property was not claimed within six months' receipt of this notice, the Department would consider the property to be unclaimed and subject to disposal. This policy also applied to seized evidence, after the conclusion of the case or its investigation.

30. During the relevant time period, the Department

---

[28]Mr. Sobus testified that Mr. Seekford terminated his representation when Mr. Sobus became interested in entering a guilty plea.

[29]During his plea, Mr. Sobus acknowledged that Bradley Books was a bawdyhouse where men engaged in sodomy and unnatural sexual acts in violation of the State criminal laws.

permitted its officers to acquire unclaimed property with the approval of the chief of police.

31. In the latter part of 1990, Sergeant Steven Tuel assumed the duties of Identification Section Assistant; he was therein assigned to assist Lieutenant Alice Moore in the inventory and disposal of certain evidence and property that had accumulated over the years in police custody. When he began working on this project, Sergeant Tuel discovered the materials that had been seized from Bradley Books. Sergeant Tuel asked Corporal Servacek if it was necessary to retain the Bradley Books materials. Corporal Servacek, in turn, inquired of Assistant State's Attorney Shelley Barrett[30] whether the instant property could be disposed of, but she did not respond.

32. After waiting for a period of months, Sergeant Tuel advised Lieutenant Moore that he had not received an answer from the State's Attorney's Office concerning how to handle the Bradley Books evidence. Sometime thereafter, at Lieutenant Moore's request, Defendant Police Chief Ashton posed the same question to State's Attorney Dorsey, but again, received no reply. Over one month later, Sergeant Tuel again raised the matter with Lieutenant Moore, who made further inquiries of Defendant Police Chief Ashton.

33. After waiting for approximately one year to hear from the State's Attorney's Office, Sergeant Tuel visited the Office and spoke with Assistant State's Attorney Don

---

[30]Ms. Barrett was involved in the prosecution of Mr. Sobus.

Grossnickle about the proposed disposal of the Bradley Books property. Soon thereafter, State's Attorney Dorsey called Sergeant Tuel and personally advised the latter that he could dispose of the evidence.

34. On October 14, 1991, Corporal Servacek sent a memorandum to Police Chief Ashton requesting permission to take possession of some of Plaintiff's property pursuant to a departmental policy that permitted officers to lay claim to unclaimed property. Defendant Ashton approved the request that same day. Both Corporal Servacek and Chief Ashton believed at that time that Plaintiff had abandoned the materials.

35. Defendant, however, failed to notify Bradley Books of the need to retrieve its materials.

36. Thereafter, Corporal Servacek claimed a number of television sets and VCRs, which he believed to be in poor condition.[31] The Police Department kept one television and one VCR to be used for showing in-house training films.

37. At some unknown date, Sergeant Tuel unilaterally chose to dispose of the remaining books and films at the city dump. He mistakenly believed that these materials had been declared contraband during the course of the Sobus' guilty plea. Defendants were not aware of this action at the time.

---

[31]Corporal Servacek testified that he had attempted to repair some of the television sets, but was unable to make them operational.

III. CONCLUSIONS OF LAW

1. At all relevant times, Defendants were "persons" within the meaning of 42 U.S.C. §1983 and were acting under "color of state law." See generally Monroe v. Pape, 365 U.S. 167 (1961).

2. Based upon his research, his careful investigation and his consultations with Police Chief Ashton and the Frederick County State's Attorney's Office, Defendant Corporal Servacek had probable cause to apply for a search and seizure warrant. Having reviewed the detailed information contained in the Application, including, inter alia, the summary of Officer Gearinger's investigation, the positive results of the Maryland State Police Laboratory analysis and accompanying exhibits, Judge Bower had probable cause to issue the Warrant.

3. The Warrant ws not overly broad, but included a sufficiently particular standard by which Corporal Servacek could evaluate whether an item was putatively obscene under Maryland law.[32] See also United States v. Espinoza, 641 F.2d

---

[32]Notably, the language of the Warrant limited the discretion of Corporal Servacek in that it required any seized items to fall within the purview of an obscenity test comparable to that articulated in Miller v. California, 413 U.S. 15, 24 (1973). Under Miller, obscene materials are "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Id.

153, 164-165 (4th Cir.), cert. denied, 454 U.S. 841 (1981) (citations omitted). Having examined each item prior to seizure,[33] Corporal Servacek had probable cause to seize the materials that were selected by him for seizure.

4. The individual Defendant Officers executed the Warrant under a reasonably good faith belief that the Warrant was lawful. This assumption was reasonably based upon the statutory language contained in the Warrant, the participation of the Frederick County State's Attorney's Office and Judge Bower's review of the Warrant and Application. See Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); United States v. Leon, 468 U.S. 897, 922 n.23 (1984); Martin v. Gentile, 849 F.2d 863, 869 n.7 (4th Cir. 1988). Plaintiff has not produced any evidence showing that the individual Defendant Officers should have believed, at that time, that the facially valid Warrant was required to identify the items to be seized with more particularity. See, e.g., Supreme Video, Inc. v. Schauz, 15 F.3d 1435, 1440 (7th Cir. 1994), citing Sequoia Books, Inc. v. McDonald, 725 F.2d 1091, 1094 (7th Cir.), cert. denied, 469 U.S. 817 (1984); Torchinsky v. Siwinski, 942 F.2d 257, 262 (4th Cir. 1991) (presumption of reasonableness attached to the obtaining of a warrant). To the contrary, the record and the testimony given by the individual Defendant Officers reflect a concerted effort made by them to ensure that the investigation and the ensuing Warrant were properly executed based upon the clearly established law at the time of the seizure.

---

[33]See, e.g., Defendants' Exhibits 4A-4P.

5. The evidence submitted by Plaintiff did not establish that the individual Defendant Officers seized the Bradley Books materials for any reason other than evidentiary purposes. Equally, there was testimony that Bradley Books replaced the seized materials and resume operations within a number of day. Plaintiff has not shown that a prior restraint was imposed upon it. Supreme Video, 15 F.3d at 1442-43, citing Heller v. New York, 413 U.S. 483, 492--93.

6. Moreover, Plaintiff has not shown that its request for a prompt post-seizure adversarial hearing was formally pursued in court. Supreme Video, 15 F.3d at 1443, citing Heller, 413 U.S. at 490-91. Instead it appears that the only effort made by Plaintiff in this arena consisted of the February 9, 1990 letter.

7. Judgment as to Counts I and II will be entered in favor of Defendant Officers Robert A. Servacek, Davis S. Gearinger and John Lammers.

8. Plaintiff's contention that Defendant Police Chief Ashton was, at all pertinent times, the "highest decision maker" for the City of Frederick is not borne out by the evidence. Plaintiff also has not shown the existence of any policy with respect to: (I) the imposition of prior restraints; or (ii) the enforcement of an invalid search and seizure warrant. Defendant Police Chief Ashton's direct involvement in this case was limited to overseeing Ashton's direct involvement in this case was limited to overseeing the initial investigation, reviewing the Warrant Application and being the recipient of Mr. Seekford's February 9, 1990 letter. Plaintiff has not shown that Chief Ashton acted with an improper motive. See Fisher v. Washington Metro. Area Transit Auth., 690 F.2d 1133, 1142-43

(4th Cir. 1982). Plaintiff has not shown that Chief Ashton's review of either the investigation or the Warrant Application was rendered in an unreasonable fashion. The record shows further that Chief Ashton acted reasonably in forwarding Mr. Seekford's letter to the State's Attorney's Office. Judgment as to Counts I and II will be entered in Defendant Police Chief Ashton's favor.

9. The record does not reveal the presence of any unconstitutional custom or practice on the part of the City of Frederick. See Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988). The execution of the Warrant in this case alone cannot, without more, provide a sufficient predicate for the establishment of a municipal policy. Pachaly v. City of Lynchburg, 897 F. 723, 726 (4th Cir. 1990). Judgment as to Counts I and II will be entered in the Defendant City of Frederick's favor.

10. Although not pleaded in its Complaint, Plaintiff's papers assert that Defendants violated its rights of due process when they seized and subsequently discarded the Bradley Books materials with giving notice to Plaintiff. As noted by Defendants, however, Plaintiff was not without access to state post-deprivation remedies. See Md. Ann. Code of 1957, Article 27, §551. Plaintiff has not shown a constitutional deprivation of property without due process of law. Kennedy v. Widdowson, 804 F. Supp. 737, 742-43 (D. Md. 1992) (citations omitted). Additionally, it has not been shown that Defendants' failure to properly return the Bradley Books materials was anything more than mere negligence. See Daniels v. Williams, 474 U.S. 327 (1986).

11. The Court has supplemental jurisdiction over

Count III. 28 U.S.C. §1367(a).

12. Defendants do not dispute that they failed to give proper notice to Plaintiff concerning the need to claim the seized Bradley Books materials in contravention of both the City of Frederick Code §17-6 (Ord. No. G-75-9) and the Police Department policy. As such, Defendants wrongfully deprived Plaintiff of this property.

13. Judgment as to Count III will be entered in Plaintiff's favor and against the Defendant City of Frederick in the amount of $20,775.41 which represents the fair market value of the property at the time of seizure.

14. Finally, Plaintiff has not presented cause for the imposition of any prospective declaratory or injunctive relief. See Supreme Video, 15 F.3d at 1443.

IV. CONCLUSION

As determined above, the record shows that Defendants did not violate Plaintiff's constitutional rights with respect to the within seizure. That having been said, however, the record also shows that Defendants' conduct with respect to the seized materials was regrettably careless and could have been easily prevented.

It is equally regrettable that the progress of this case was serious hampered by the inadvertent misplacement of the court file when the Court's Chambers were moved to another floor of the courthouse. The delay in the issuance of this opinion is directly related to that loss and is not in any way connected with

the substance of this case. Both counsel are to be commended for their work herein.

A separate Order shall enter.

(Date)

Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PINKLEY, INC., T/A "BRADLEY BOOKS"	*	
v.	*	Civil Action No. N-93-397
ROBERT A. SERVACEK, et al.	*	

* * * * * * * * *

ORDER

The Court having considered the parties's evidence, testimony and related arguments, and the Court having made its findings of fact and conclusions of law in the foregoing Memorandum, IT IS this 21st day of January, 1996, by the United States District Court for the District of Maryland hereby ORDERED:

1. That this case is DISMISSED as against Defendant Shown Martyak;

2. That JUDGMENT as to Counts I and II is ENTERED in favor of the Defendants and against Plaintiff;

3. That JUDGMENT as to Count III is ENTERED in favor of Plaintiff and against Defendant City of Frederick in the amount of $20,775.41;

4. That this case is CLOSED; and

5. That the Clerk of Court shall MAIL copies of this Order, together with the foregoing Memorandum, to all parties of record.

Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PINKLEY, INC., T/A "BRADLEY BOOKS"	*	
v.	*	Civil Action No. N-93-397
ROBERT A. SERVACEK, et al.	*	

* * * * * * * * *

MEMORANDUM AND ORDER

Presently pending before the Court for consideration is Plaintiff's Motion to Alter or Amend the Judgment filed pursuant to Fed. R. Civ. P. 59(e). Defendants have not filed a response. No hearing is necessary. Local Rule 105.6 (D. Md. 1995). For the reasons set forth below, Plaintiff's Motion will be denied.

On January 19, 1996, this Court issued a Memorandum that set forth its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 50(a). Fourteen days later, on February 2, 1996, Plaintiff filed the instant Motion, specifically seeking relief under Rule 59(e) provides:

> [a] motion to alter or amend the judgment shall be served no later than 10 days after entry of the judgment. (emphasis added)

The courts have clearly established that the ten day time constraint contained in Rule 59(e) is to be strictly construed. In cases wherein a motion in unnamed and does not refer to a specific Federal Rule of Civil Procedure, the courts have considered that motion to be either a Rule 59(e) motion to alter or amend the judgment or a Rule 60(b) motion for relief from judgment or order. See, e.g., In re Burnly, 988 F.2d 1, 2 (4th Cir. 1992). In this instance, however, Plaintiff specifically designed its Motion as seeking to alter or amend the judgment pursuant to Rule 59(e). As such Plaintiff's Motion is untimely filed and must be denied.[1]

Even where this Court to consider Plaintiff's Motion pursuant to Rule 60(b), the Court would find that Plaintiff has failed to show cause for relief. As to Counts I and II, Plaintiff has failed to show cause for relief. As to Counts I and II, Plaintiff's Motion does not raise new grounds for consideration, but instead repeats previously cited legal agruments in an effort to convince the Court to "change its mind." Such relief is not authorized under Rule 60(b). CNF Constructors, Inc. v. Donohue Construction Co., 57 F.3d 395, 400 (4th Cir. 1995), citing United States v. Williams, 674 F.2d 310, 312 (4th Cir. 1982). As to Counts III, the Court finds that Plaintiff has not

---

[1]The Court notes that the Fourth Circuit has twice held in unpublished opinions that the filing period in Rule 59(e) is mandatory and jurisdictional. United States v. Whedbee, 1994 WL 142456 (4th Cir. Apr. 21, 1994); Telford v. Vandusen, 1992 U.S. App. LEXIS 18, 021 (4th Cir. 1992). It therefore appears that this Court is without the authority to consider Plaintiff's Motion.

proven that an error was made in the calculation of damages awarded thereunder.

The Court having considered Plaintiff's Motion to Alter or Amend Judgment, IT IS this _____ day of November, 1999, by the United States District Court for the District of Maryland hereby ORDERED:

1. That Plaintiff's Motion to Alter or Amend Judgment is DENIED; and

2. That the Clerk of Court shall MAIL copies of this Memorandum and Order to all parties of record.

_____

Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PINKLEY, INC., T/A "BRADLEY BOOKS"	*	
v.	*	Civil Action No. N-93-397
ROBERT A. SERVACEK, et al.	*	

* * * * * * * * *

ORDER

The Court having considered Plaintiff's Motion to Alter or Amend And/Or Grant Relief From the Decision and Order of the Court denying Plaintiff's Motion Filed under F.R.C.P. 59(e), and it appearing that even if Plaintiff's Motion to Alter or Amend Judgment may be considered timely filed pursuant to, inter alia, Fed. R. Civ. P. 6(a), for the reasons stated in this Court's Memorandum and Order of March 4, 1996, the Court finds that Plaintiff's underlying Motion to Alter or Amend Judgment is without merit. Accordingly, IT IS this _____ dau of November, 1999, by the United States District Court for the District of Maryland hereby ORDERED:

1. That Plaintiff's Motion to Alter or Amend And/Or Grant Relief From the Decision and Order of the Court denying Plaintiff's Motion Filed under F.R.C.P. 59(e) is DENIED; and

2. That the Clerk of Court shall MAIL copies of this Order to all parties of record.

Edward S. Northrop
Senior United States District Judge

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[AMENDMENT VI]

[The Right of People to be Secure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

[AMENDMENT XIV]

Section 1.

[Citzenship Rights Not to be Abridged by States]

All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Code, Title 28

§1367. Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are no related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constititution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Article 27, Annotated Code of Maryland

NUDITY AND SEXUAL DISPLAYS

Subsection 416A. Definitions

The following words and phrases, as used in this subheading, have the meanings indicated:

(c) "Sadomasochistic abuse" means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bounds, or otherwise physically restrained.

(d) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of or contact with the genitals, pubic areas or buttocks of the human male or female, or the same or opposite sex, or between humans and animals.

(e) "Sexual excitement" means the condition of human male or female genitals, or the breasts of the female, when a state of sexual stimulation, or the sensual experiences of humans engaging in a witnessing sexual conduct or nudity.

Subsection 416D. Displaying certain visual representations for advertising purposes.

(a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual

representation or image of a person or portion of the human body that depicts sadomasochistic abuve, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items.

(b) Any person, firm or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented or managed by it.

Subsection 418. Sending or bring into State for sale or distribution; publishing, etc., within State.

Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Subsection 418A. Injunctive remedy.

The circuit courts of the counties have jurisdiction to enjoint the sale or distribution of any book, magazine, or any other publication or article (including a motion picture film or showing) which is prohibited from sale or distribution, as hereinafter specified.

1. The State's Attorneys of the counties in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or

distribute any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or phograph (including a motion picture film or showing) or any article or instrument of use which is obscene, within the meaning of §418 of thsis article may maintain an action for an injunction against such person, firm or corporation in the circuit court of the counties to prevent the sale or further sale or the distribution or further distribution or the acquisition, publication or possession within this State of any book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph (including a motion picture film or showing), or any article or instrument of use which is obscene.

2. The person, firm, or corporation sought to be enjoined is entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days after the conclusion of the trial.

3. In the event that an order or judgment be entered in favor of the State's Attorney and against the person, firm or corporation sought to be enjoined, such final order or judgment shall contain a provision directing the person, firm or corporation to surrender to such peace officer as the court may direct or to the sheriff of the county in which the action was brought any of the matter described in this section and such sheriff or officer shall be directed to seize and destroy the same.

Subsection 421. Obscene advertising.

Every person who knowingly writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out

by him to be obscene, is guilty of a misdemeanor.

(2)

Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

No. 99-917

In The

Supreme Court of the United States

PINKLEY, INCORPORATED t/a "Bradley Books",

Petitioner,

v.

ROBERT A. SERVACEK, DAVID S. GEARINGER, JOHN LAMMERS, Individually and in their official capacities as police officers of Frederick City Police Department City of Frederick, Maryland; RICHARD J. ASHTON, Individually and in his official capacity as a Major and Chief of Frederick City Police Department and policy maker of City of Frederick, Maryland; and the Mayor and Board of Alderman of City of Frederick, Maryland constituting and acting as City of Frederick, Maryland,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard J. Schulman
Counsel of Record
SCHULMAN & KAUFMAN, LLC
100 Light Street, Suite 1330
Baltimore, Maryland 21202-3060
(410) 576-0400

Counsel for Respondents

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

6PP

STATEMENT OF THE CASE

On February 1, 1990, Corporal Servacek prepared a fifteen–page draft application and affidavit for a search warrant, which averred that there was probable cause to believe that the Maryland Criminal Code, 27 Md. Code, " 416D, 418 and 421 (App. 57A-60A) provisions concerning the display and distribution of obscene matters were being violated by the Petitioner. The fifteen -page application and affidavit set forth the investigation and detailed the explicit adult nature of the materials and activities at Bradley Books. Police Chief Ashton and then the State's Attorney reviewed the application and warrant for sufficiency. On February 5, 1990, Corporal Servacek appeared before the Honorable Frederick J. Bowers, a judge of the District Court of Maryland for Frederick County, who reviewed the warrant application and issued the warrant. On February 7, 1990, Corporal Servacek and a search and seizure team of the Frederick City Police Department executed the warrant. Corporal Servacek determined what materials would be seized by attempting to assess whether an item fit within the definition of obscene as set forth in the warrant application. None of the other officers present participated in the selection of materials to be seized. App. 26A-38A.

ARGUMENT

The Court should deny the petition, because the questions presented are vague, ambiguous and difficult to understand. The questions presented are not addressed in the argument in support of the petition, which instead reiterates, nearly verbatim, portions of Petitioner's brief in the Court of Appeals. Petitioner presents no argument that the decision of the Court of Appeals is in conflict with the decision of another court of appeals or a state court of highest resort on an important federal question. Petitioner has not argued that the Court of Appeals in this case departed from the accepted

and usual course of judicial proceedings or sanctioned such a departure. Moreover, Petitioner is simply wrong in face of overwhelming authority contrary to its position.

The first three questions presented address whether the Court of Appeals failed to conduct a *de* novo review of record. There, however, is nothing in the opinion of the Court of Appeals or in the record to support an assertion that the Court of Appeals did not conduct a *de* novo review of the record. The Court of Appeals stated that it was affirming as to the federal claims, for the reasons stated by the district court in its opinion. App. 20A. Petitioner did not even bother to state the basis for its suggestion that the Court of Appeals failed to conduct a *de* novo review of record. Nor did Petitioner raise this issue in the Court of Appeals.

"[T]he question of qualified immunity is not the question whether a constitutional right has been violated." *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990). The district court found that the individual officers executed the warrant upon an objectively reasonable and good faith belief that the warrant was lawful. Their belief was reasonably based on the statutory language contained in the warrant, the review of the warrant and application by the supervising state's attorney and a judge's review of the warrant and application. The individual officers made a concerted effort to insure that the investigation and the ensuing warrant were lawful. A presumption of reasonableness attached to the officers' obtaining a warrant, and Petitioner did not produce any evidence showing that reasonably well-trained officers should have known that the facially valid warrant should have identified each item to be seized with more particularity. Petitioner failed to establish that the individual officers seized the materials for any reason other than evidentiary purposes. Petitioner did not establish that Respondents acted in contravention of any clearly established law of which a reasonably well-trained officer would have known. App. 26A-38A. There was overwhelming authority to support these findings. *United*

States v. Leon, 468 U.S. 897, 920 & n.20, 922-23 & n.23 (1984); *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987); *Martin v. Gentile*, 849 F.2d 863, 869 & n.7 (4th Cir. 1988); *see also Collinson*, 895 F.2d, at 998-999; *United States v. Edwards*, 798 F.2d 686, 690-92 (4th Cir. 1986); *Torchinsky v. Siwinski*, 942 F.2d 257, 262 (4th Cir. 1991); *United States v. Espinoza*, 641 F.2d 153, 164-165 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981); *Sequoia Books v. McDonald*, 725 F.2d 1091, 1093-94 (7th Cir.)(applying *Espinoza* to a ' 1983 action), *cert. denied*, 469 U.S. 817 (1984); *United States v. George*, 971 F.2d 1113, 1124 (4th Cir. 1992)(when the inquiry was properly focused on the objective reasonableness of the officers' actions, it was evident that the officers did reasonably believe that their conduct was fully consistent with the Fourth Amendment as the officers consulted with the county prosecutor as to whether to apply for the search warrant and thereafter received the facially valid warrant from a duly authorized judicial official; and, the affidavit contained no false statements). Indeed, in *Leon*, several deputy district attorneys reviewed the application for the warrant, which was facially valid and issued by a state court judge.

Petitioner has not pointed to any conflict among the circuits that would suggest review by this Court would be in the public interest. Nor could it. *Sequoia Books*, for instance, rejected the very arguments made by the Petitioner in this Court. *See* 725 F.2d, at 1093. *See also Randall Book Corporation v. State*, 64 Md. App. 589, 602 (1985)(In view of *Leon*, it is immaterial whether the search warrant was defective as either authorizing the seizure of First Amendment protected material or in permitting the police officers to determine what materials were obscene), *cert. denied*, 305 Md. 175 (1986), *cert. denied* 480 U.S. 940, *reh. denied*, 481 U.S. 1060 (1987).), *cert. denied*, 305 Md. 175 (1986), *cert. denied* 480 U.S. 940, *reh. denied*, 481 U.S. 1060 (1987).

Petitioner relies upon a plethora of cases, for the proposition that the search warrant in question was forbidden by "clearly established law". Such cases articulate broad propositions and are not fact specific to this case and, therefore, do not define the contours of "clearly established". *Anderson*, 483 U.S., at 639-41. Here, the case law indicates that the specific propositions advanced by Petitioner, i.e., that the warrant was overly broad and did not establish probable cause as to each item that was seized and that a pre-seizure adversary hearing was mandated, are not "clearly established", even if they were correct. *See e.g. Espinoza* and *Sequoia Books; see also Heller v. New York*, 413 U.S. 483, 487-90 (emphasizing the distinction between a seizure pursuant to a warrant effecting a temporary removal from an owner's possession and a seizure for purposes of destruction; finding the absence of either a final or temporary restraint by a seizure pursuant to a warrant; noting that petitioner made no pretrial motions seeking return of the film or challenging its seizure or requesting expedited judicial consideration of the obscenity issue, so as to obtain a prompt judicial determination of the obscenity issue in an adversary proceeding, if petitioner had desired; excluding from any consideration of "promptness" those delays caused by the choice of a defendant in state court criminal proceedings); *Greenmount Sales Inc. v. Davila*, 479 F.2d 591, 593-94 (4th Cir. 1973)(Concluding that the First Amendment did not require an adversary hearing prior to a seizure pursuant to a warrant directing police to search for "obscene items" and distinguishing *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir.1969) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964)).

The Court in *Heller*, 413 U.S., at 487-490 unequivocally rejected that a prior adversary hearing is required in all cases where allegedly obscene material is seized. Likewise, *Roaden v. Kentucky*, 413 U.S. 496, 502-507 (1973) indicates that a warrant for the seizure of allegedly obscene materials on the basis of non-conclusory

assertions with a review of some of the materials by a magistrate is constitutional.

Petitioner argues that the Court of Appeals erred in concluding that the district court should not have exercised supplemental jurisdiction over the state law conversion claims. Without arguing a conflict among the decisions of the courts of appeals on a question of law, Petitioner points to those decisions in which the courts found an issue tried by the implied consent of the parties. Here, however, the Court of Appeals found that Petitioner failed to plead or include in the pre-trial order a state law claim and that Respondent had not consented in any fashion to the trial of a state law conversion claim. App. 15A-20A.

Plaintiff raises an evidentiary question concerning the admission of hearsay statements by Sobus made in state court, when he pled guilty to the obscenity charge. The record reflects, however, that the Plaintiff did not object at trial. The question was not raised or decided in the district court. Nor was this question decided by the Court of Appeals.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests the Court to deny the petition.

Respectfully submitted,

Howard J. Schulman
Counsel of Record
SCHULMAN & KAUFMAN, LLC
100 Light Street
Suite 1330
Baltimore, Maryland 21202-3060
(410) 576-0400

Counsel for Respondents

Supreme Court, U.S.
FILED
JAN 13 2000
OFFICE OF THE CLERK

(3)

No. 99-917

IN THE

Supreme Court of the United States

PINKLEY INCORPORATED t/a "Bradley Books",

Petitioner,

v.

ROBERT A. SERVACEK, DAVID S. GEARINGER, JOHN LAMMERS, Individually and in their official capacities as police officers of Frederick City Police Department City of Frederick, Maryland; RICHARD J. ASHTON, Individually and in his official capacity as a Major and Chief of Frederick City Police Department and policy maker of City of Frederick, Maryland; and the Mayor and Board of Alderman of City of Frederick, Maryland constituting and acting as City of Frederick, Maryland,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

WILLIAM E. SEEKFORD
Attorney for Petitioner
9924 Pepper Hill Road
Perry Hall, Maryland 21128
(410) 529-0422

INTRODUCTION

Respondents, in their Brief in Opposition submit their argument under a single "Argument" title but in doing so raise three new points for this Court's consideration to which Petitioner files its Reply Brief herein. They argue: (1) Petitioner presents no argument, as they deem is necessary for certiorari review, that the decision of the Court of Appeals was in conflict with the decisions of another Court of Appeals or a State Court of last resort on an important federal question; (2) Petitioner has not argued that the Court of Appeals departed from the accepted and usual course of judicial proceedings or sanctioned such a departure; and (3) Overwhelming authority contrary to Petitioner's position makes Petitioner simply wrong.

ARGUMENT IN REPLY

Respondents apparently has completely overlooked the provisions of Supreme Court Rule 10, and 10 (c), upon which Petitioner sought certiorari, by basing their response upon the terms of Supreme Court Rule 10 (a) seeking denial of review by certiorari.

The Petition presented by Pinkley, Inc. specifically sought certiorari review under the introductory provision of Rule 10 as well as the specific provisions of Rule 10 (c) claiming that, while recognizing review is within this Court's discretion, there are compelling reasons for granting review because a Court of Appeals has decided each of these important federal questions in a way that conflicts with relevant decisions of this Court.

Respondents sub silentio apparently concede that District Court Judge Bowers merely reviewed the application and issued the warrant and made no independent, neutral and detached judicial determination of probable cause himself but relied solely upon the police officer's determinations (Brief In Opp., pp. 1 Statement of the Case). However, the Respondents affirmatively admit that the search team (police defendants here) jointly executed the search warrant during which "Servacek determined what materials would be seized by attempting to assess whether an item fit within the definition of obscene as set forth in the warrant application."

Although they concede that Respondents Servacek, Gearinger and John Lammers (Servacek's search and seizure team) jointly conducted the search and seizure effort, they only concede that Servacek alone determined what speech materials would be seized in an apparent effort to escape joint liability with him in engaging in a prohibited mass seizure of presumptively protected works of expression.

The District Court Judge, in his "Findings of Fact" NO. 20 found that upon review of the warrant application Judge Bower issued the warrant but the District Judge did not state that Judge Bower made no finding of fact, that probable cause existed as a independent, neutral and detached judicial officer, and under the warrant's terms directed the police officer to determine what was to be seized under it. Yet under his "Conclusions of Law' NO. 2 he found that Judge Bower somehow had probable cause to issue the warrant but did not mention that Judge Bower made absolutely no finding of probable cause but simply rubber stamped the police officers determination. Equally as egregious is his conclusions of law NO. 3 that the language of the warrant limited the discretion of the police officer to that which he determined came within

the non-sanctioned obscenity definition he himself put in the warrant he prepared. Nothing was set out about a total lack of particularity as to what was to be seized.

The Court of Appeals simply summarily affirmed the District Court findings, legal rulings and dismissal for the very erroneous and unconstitutional reasons set out by the District Court.

Respondents have cited several decisions of the Fourth Circuit and one Seventh Circuit decision as somehow confirming its position that no conflict between federal Circuits existed and that overwhelming Circuit precedent existed against Petitioner.

The Respondents apparently are of the opinion that decisions between Circuits must be in conflict whereas Petitioner relies upon this Court's decisions as paramount constitutional law. Thus the basis for review.

The following are some of the compelling rulings of this Court refuting the Respondents' claims of overwhelming authority contrary to Petitioner's position.

This Court has firmly stood as a bar against issuance of a search and seizure warrant or order supported only by police determinations or by prosecutor's review without an independent judicial finding of probable cause. Lee Art Theaters v. Virginia, 392 U.S. 636, holding to that effect is in good company with Gerstein v. Pugh, 420 U.S. 103, Coolidge v. New Hampshire, 403 U.S. 443, 449-53, Shadwick v. City of Tampa, 407 U.S. 345, Lo-Ji Sales v. New York, 442 U.S. 319, and Blount v. Rizzi, 400 U.S. 410. Thus this Court's holdings remove alleged overwhelming Circuit authority on that point.

This Court has also stood firmly as a bar against a failure to particularize the items of speech works to be seized allowing police to make ad hoc determinations and allowing mass seizures of speech Stanford v. Texas, 397 U.S. 476, 481, Lo-Ji Sales v. New York, 442 U.S. 319, 325, Marshall v. Barlows, Inc. 436 U.S. 307, 311, Marcus v. Search Warrants, 367 U.S. 717, 724, and Roaden v. Kentucky, 413 U.S. 496, 502. Thus alleged overwhelming Circuit authority permitting such warrants, even if existing, cannot overwhelm these holdings of this Court.

Respondents reliance upon U.S. v. Espinoza, 641 F2d 153 (CA 4, 1981) is misquoted as to its facts and application. The Espinoza warrant for searching a warehouse for obscene magazines including but not limited to "erotic hands" actually resulted from evidence seized in a 1976 federal California search warrant in Las Vegas with detailed affidavits. The only evidence admitted in Espinoza were photos taken in the Nevada warehouse and the suppression claim was not made by J.E. Enterprises, owner of the warehouse, who was tried in absentia but by Espinoza who had no standing to object. Espinoza erroneously argued the Magistrate erred by not personally viewing the magazine but relying in affidavits.

Similarly, in Sequoia Books v. McDonald, 725 F2d 1091 (CA 7, 1984) there were described 9 items in a detailed affidavit and the warrant ordered seizure of them and others with specified sexual conduct. Later the People v. Eagle Books, Inc. 602 NE2d 798 decision in that State held such conduct provisions for seizure and particularity as prohibited general warrants. Also this Court subsequently decided Ft. Wayne Books v. Indiana, 489 U.S. 46 from the Sequoia Circuit Court which rejected such general warrants for officers

to seizure similar materials. Therefore the overwhelming authority lies in this Court and claims of comparable Circuit decisions are of no value.

For these reasons the Respondents new points and issues should be rejected and Petitioner urges this Court to vacate the judgment of the Circuit Court and direct it on remand to reverse the District Court as to all three civil rights counts.

Respectfully submitted,

William E. Seekford, Esquire
9924 Pepper Hill Road
Perry Hall, Maryland 21128
(410) 529-0422
Counsel for Petitioner